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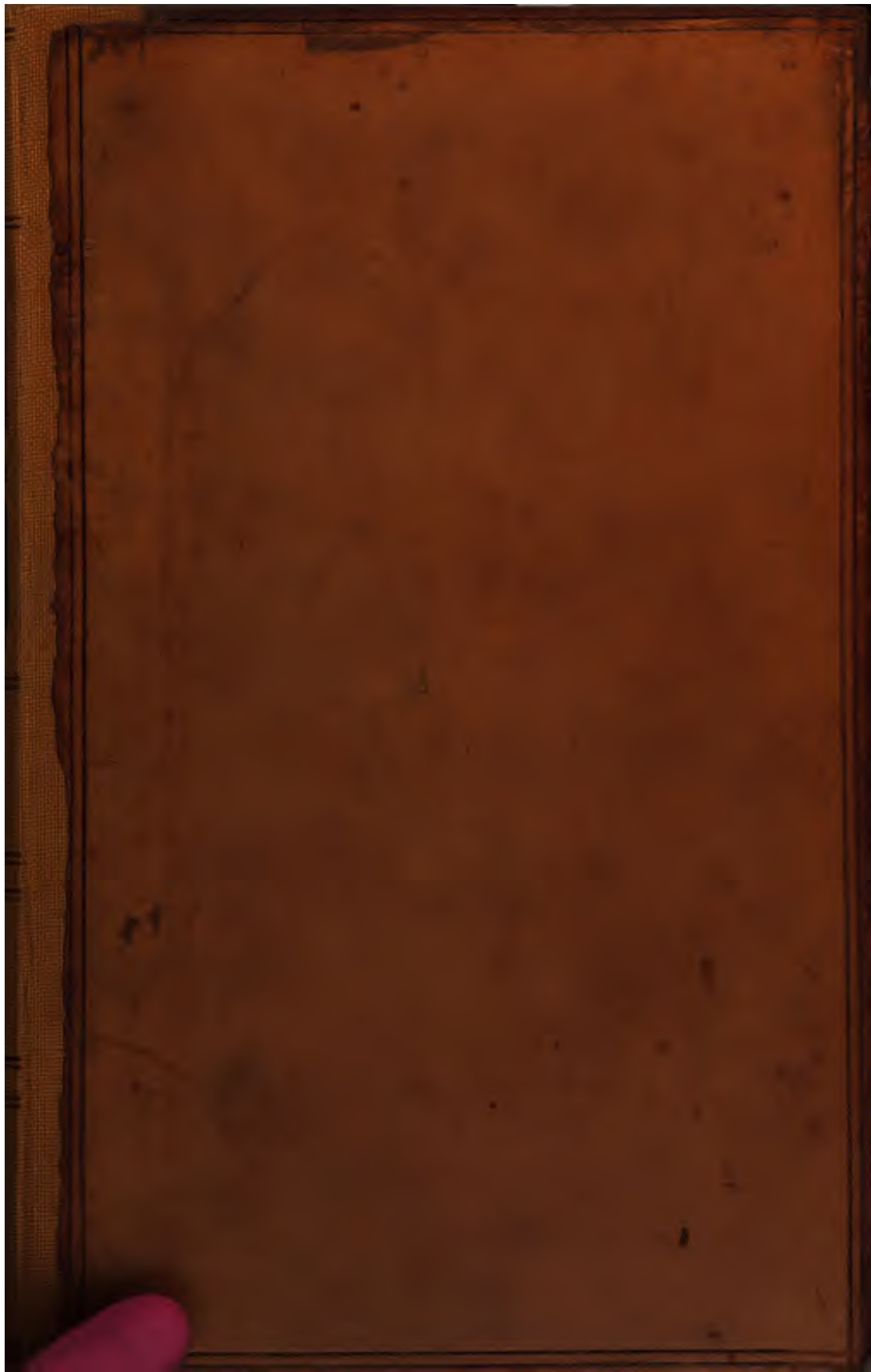
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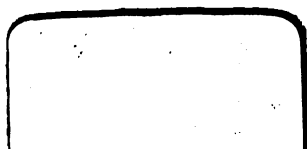
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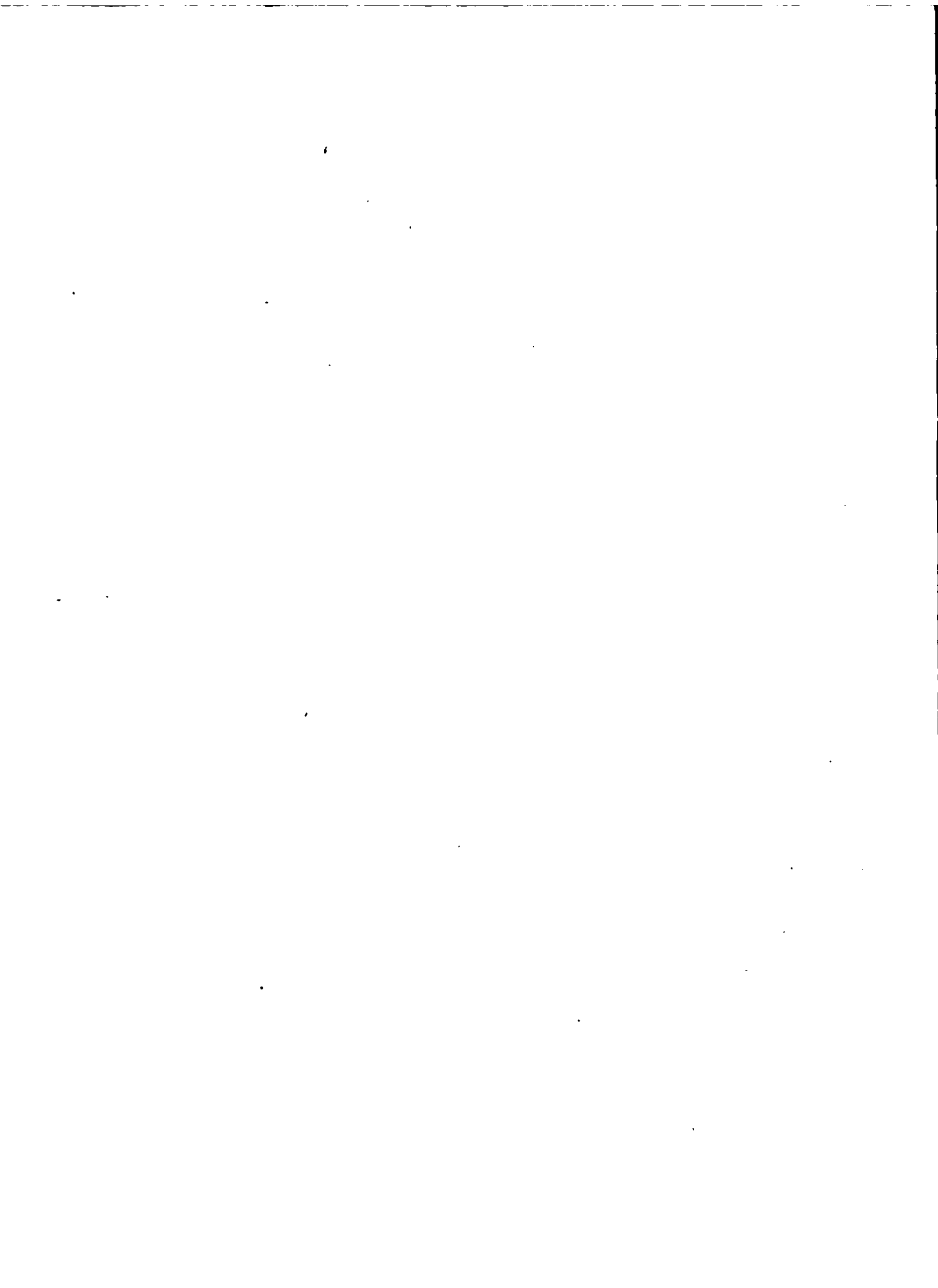
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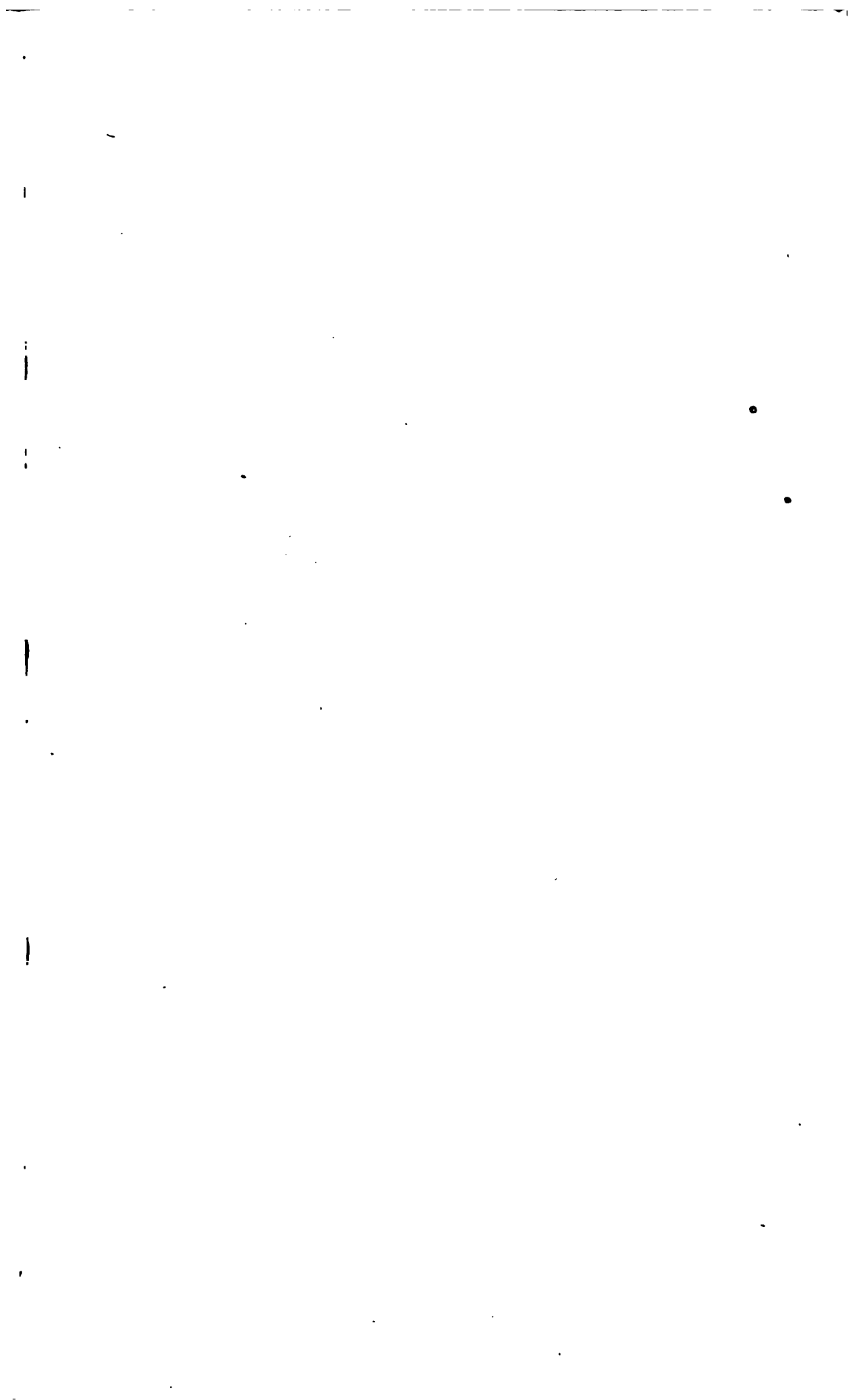
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# IRISH EQUITY REPORTS

(THIRD SERIES OF 'THE LAW RECORDER'),

PARTICULARLY OF

POINTS OF PRACTICE,

ARGUED AND DETERMINED IN THE

HIGH COURT OF CHANCERY,

THE

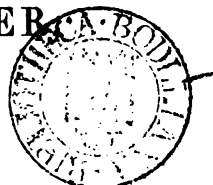
ROLLS COURT,

AND THE

EQUITY EXCHEQUER

IN

**Ireland,**



*From Michaelmas 1838, to Trinity, 1839, inclusive,*

In the Second and Third Years of the Reign of Queen Victoria.

---

Chancery:

By CHARLES HAIG, Esq.

Rolls:

By WILLIAM BEAUCHAMP STOKER, Esq.

Equity Exchequer:

By ROSS S. MOORE, Esq.

BARRISTERS-AT-LAW.

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VOL. I.

DUBLIN:

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1839.



# JUDGES AND LAW OFFICERS

DURING THE PERIOD OF THESE REPORTS.

---

## HIGH COURT OF CHANCERY.

*Lord Chancellor.*—LORD PLUNKET.

*Master of the Rolls.*—SIR MICHAEL O'LOGHLEN.

## COURT OF EXCHEQUER.

*Chief Baron.*—The Right Honorable STEPHEN WOULFE.

*Second Baron.*—The Honorable RICHARD PENNEFATHER.

*Third Baron.*—The Honorable JOHN LESLIE FOSTER.

*Fourth Baron.*—The Right Honorable JOHN RICHARDS.

## ATTORNEYS GENERAL.

The Right Honorable NICHOLAS BALL.

The Right Honorable MAZIERE BRADY.

## SOLICITORS GENERAL.

MAZIERE BRADY, Esq.

DAVID ROBERT PIGOT, Esq.

## SERGEANTS.

*First Sergeant.*—RICHARD WILSON GREENE, Esq.

*Second Sergeant.*—JOSEPH DEVONSHER JACKSON, Esq.

*Third Sergeant.*—WILLIAM CURRY, Esq.



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## CORRIGENDA.

### ROLLS.

Page 18, *for* Parvisol v. O'Dell, *read* Parvisol v. Ball.

Pages 60, 61, 66, *for celles que trust*, *read* *cestui que trust*.

Page 156 in marginal note, 13th line from bottom, *for* one of R.'s executors, *read* one of M.'s executors.

Page 201, 15th line from bottom, *for* the lands were then in his possession, *read* the lands were *not* then in his possession.

### EQUITY EXCHEQUER.

Page 27, line 20, *for single contract*, *read* *simple contract*.

Page 78, last line of foot note, *for* decreed allowed, *read* deemed allowed.

Page 279, note, *for* 7 G. 5, *read* 7 G. 4.

C A S E S  
IN THE  
COURTS OF CHANCERY, ROLLS, AND  
EQUITY EXCHEQUER.

---

CHANCERY.

*Monday, November 12, 1838.*

SPECIFIC PERFORMANCE—QUIA-TIMET BILL.

VEREKER v. Lord GORT.

This was a bill filed by the Hon. John Prendergast Vereker, and Maria Vereker, otherwise O'Grady, his wife, and Standish O'Grady, their eldest son, a minor, against Charles Viscount Gort, and Eyre Lloyd.

By deed of the 7th January, 1814, the lands of Roxburgh were settled to such uses as the defendant, Lord Gort, and his son, the plaintiff, should appoint, and subject thereto to defendant for life; remainder to plaintiff for life, with remainders over.

By deed of 22d November, 1814, being plaintiffs' marriage settlement, the said lands, in consideration of the marriage, and of £10,000 the fortune of the plaintiff Maria, paid to Lord Gort, were appointed by the defendant Lord Gort, and the plaintiff Mr. Vereker, jointly, to trustees, on trust for Mr. Vereker the plaintiff, for life, and then to secure £1000 a year, to the plaintiff Maria, in full of jointure, and subject thereto, to their first and other sons in tail, with remainder over.

This deed contained a covenant by the defendant, which was the foundation of the present suit, and thereby he Lord Gort agreed, that he, his heirs, executors, and administrators, would out of their own proper monies within 5 years from the date thereof (22d November, 1814,) pay off and discharge all and every charge and incumbrance affecting

Father on marriage of son, settled certain lands and covenanted to pay off all incumbrances affecting them, Court will decree specific performance without an inquiry whether any or what damage has been sustained, incumbrancers having actually instituted suits and lands being in danger of being sold.

the said lands of Roxburgh, and all interest due, or to grow due thereon.

At the time of this deed being executed, there were several charges and incumbrances affecting the said lands, and on the 30th of July, 1830, a bill was filed by Thomas Mahon and others, against Lord Gort, and his son, the present plaintiff and others, for the purpose of raising a charge of £1000, and an arrear of interest out of the said lands of Roxburgh, and for a sale thereof and a receiver. And on the 31st October, 1833, another bill was filed by Simon Rose and others, for the purpose of raising another charge of £1000, affecting the said lands, which bill also prayed a sale and a receiver. Both these incumbrances had been charges on the lands at the time of the covenant.

About the 20th of January, 1831, by an order in the first of the above causes, a receiver was appointed over the above lands, but Lord Gort having made some arrangement with the parties, the receiver did not receive any of the rents, except one sum of £32. 6s. 1d. By an order of 30th June, 1835, the receiver was extended to the second of those causes, and an order made on Mr. Vereker, the plaintiff, to furnish a rental; and the receiver was about to let the lands, and go into receipt of the rents, when the present bill was filed.

The second defendant Eyre Lloyd, was the executor of the surviving trustee in the deed of 1814. The bill prayed, that Lord Gort might be decreed specifically to perform the covenant in the deed of 22d November, 1814, and pay off (within a term to be fixed by the court) the charges and incumbrances which affected the said lands at the time of the execution of that deed, and that a reference might be directed to the Master, to ascertain what incumbrances affected the lands at that time, and how much remained still due thereon.

Lord Gort admitted by his answer, that he had not fulfilled the covenant, but said, he paid off as much of the incumbrances as he was able; and further stated, that there were questions depending between him and the parties claiming the incumbrances, which were the subject of the two suits in which the receiver had been appointed.

Sergeant *Greene*, and Messrs. *Collins*, Q.C., and *Jeffcott*, for the plaintiffs.—This case stood over from last term in the hope that a compromise might be effected; that expectation had been disappointed, and the plaintiffs now called for the decree of the court. The injury here was rather anticipated than as yet actually arrived. But a party may file a *quia-timet* bill before he has been actually damaged, if suits are pending which will certainly inflict injury, unless the defendant performs his covenant. *Lord Ranelagh v. Hayes* (a); *City of London v.*

(a) 1 Vern. 189.

*Nash (b); Wright v. Bell (c)*.—[LORD CHANCELLOR. Thought at first, he could not give a decree, until first an inquiry was directed, whether the plaintiffs had been damnified, and how far damnified.]—We have proved the covenant to pay off the incumbrances affecting Roxburgh, within five years: that has not been performed; and now there are two suits by incumbrancers on that estate, in one of which, a decree has been pronounced for a sale of Roxburgh within six months, unless the incumbrance be paid off in the mean time.

*Messrs. Furlong Q. C., and Latouche, for defendants*.—The covenant is more properly the subject of an action at law; and where that is the case, this court will not decree specific performance. *Flint v. Brandon (d)*. In *Cud v. Rutter (e)*, the court refused specific performance of an agreement to transfer stock. If Lord Gort is unable to perform this covenant, how can the court compel him? He has pledged no lands for the performance of it: this court could only make a personal decree against him, and could not make a decree affecting any of his estates, for they are not pledged to this covenant. In *Rayner v. Stone (f)*, a demurrer was allowed to a bill for specific performance, because the remedy at law was more applicable to the case. *Darcy v. Lord Winchelsea, (g)* In the case of *Lord Ranelagh v. Hayes*, cited by the plaintiffs, there was an issue of *quantum damnificatus*.

*Mr. Collins, Q. C., in reply*.—In one of the suits which have been instituted by the incumbrancers, there has been a decree for the sale of Roxburgh, which is the family estate. If the court waits for an inquiry into the damage sustained, the mischief will be completed.

LORD CHANCELLOR.—Take a decree to pay off the two incumbrances stated in the bill, and for which suits have been actually instituted, and refer it to the Master, to inquire what other incumbrances are still outstanding, which affected Roxburgh, at the time of the covenant in the deed of 1814.

*The following are the minutes of the decree, as entered in the Register's Book.*

Declare that the defendant Lord Viscount Gort is bound specifically to perform the covenant contained in the settlement bearing date the 22d November, 1814. And it appearing

(b) 3 Atk. 511.

(d) 8 Ves. 162.

(f) 2 Eden. 128.

(c) 1 Dan. Ex. Rep. 95.

(e) 1 P. W. 570.

(g) 1 Cox. 318.

by the final decree bearing date 28th April, 1838, made in the cause in which Simon Rose, and others, are plaintiffs, and said Lord Viscount Gort, and others, defendants, that the said lands of Roxburgh have been decreed to be sold for payment of certain sums, amounting in the whole, to the sum of £2688. 9s. 2d., thereby decreed to be due on foot of certain charges which affected said lands of Roxburgh, at the time of the execution of the said settlement, with interest and costs as therein mentioned. Let said Viscount Gort, within six calendar months from date hereof, pay off and discharge unto the several persons by said decree declared entitled thereto, the several sums, costs, and accruing interest, thereby decreed to be raised by sale of said lands, unless said Lord Gort, shall in the mean time, pursuant to the leave hereinafter reserved, give unto the plaintiffs, a good and sufficient indemnity against said several sums, costs, and interest, so decreed to be raised as aforesaid. And accordingly, let the said Lord Gort, be at liberty to lay proposals before the Master as to such indemnity, and thereupon, refer it to the Master, to approve of a proper deed or deeds, instrument or instruments, for the purpose of carrying such indemnity into effect, and let such indemnity be made or given to said J. P. Vereker, for the benefit of himself and the other plaintiffs in this cause; and in case said Lord Viscount Gort, shall not give such indemnity within the time aforesaid, let plaintiffs be at liberty to issue process to compel performance of this decree, and let defendant E. Lloyd, have his costs against plaintiffs, and let plaintiffs have same, together with their own costs, in the cause against said Lord Viscount Gort; and let the parties be at liberty to apply to the court for further directions if necessary.

*Thursday, November 15th.*

BYE-GONE RENTS—RENTS ATTACHED, WHEN.

BLAND and others v. GOOLD and others.

This cause came on for further directions. The Master had made his report. The only question which arose at the hearing was, as to a certain sum of money, being arrears of rent, now in the hands of the receiver, who had been appointed not in this cause, but in another cause of *Richards* and others against *Goold* and others, all the parties in which were also parties in this cause.

Rents accrued since bill filed, and received by the receiver in another cause, are not bygone rents; and when receiver is extended by decree, on further directions will be transferred to credit of suit by prior incumbrancer, all parties being before the court.

The *Attorney General* and Mr. *Pigott*, Q. C., for the plaintiffs.—We seek that the receiver in the cause of *Richards v. Goold* should be extended to this cause, and that the sum now in his hands, being rents received out of the lands in the pleadings mentioned, should be made applicable to the payment of plaintiffs' demand in this cause, which it is admitted has priority over the demands of the plaintiffs in the other cause. Our bill prays a receiver.

Mr. *Blackburne*, Q. C., and Mr. *W. Brooke*, Q. C., for the defendants, plaintiffs in the other cause.—The sum in the hands of the receiver is in the nature of bye-gone rents. The plaintiffs here, we admit, have a right to extend the receiver in the other cause to this, but they have no right to any rents hitherto received, but only to those which shall hereafter accrue.—[LORD CHANCELLOR. Have they not a right to attach the rents which have accrued since the bill in this cause was filed? It is admitted, that the demand of the plaintiffs in this cause has priority to the demand of the plaintiffs in the cause of *Richards v. Goold*.]—We submit the plaintiffs here have no right to attach any monies now in the hands of the receiver. A party who files a bill for a receiver does not thereby attach the rents. The rents are not attached until the order for appointing the receiver is actually made: all rents received up to that time are bye-gone rents. The plaintiff here is an annuitant, and can have no better right than a mortgagee. In *Thomas v. Brigstocke* (a), it was held that a mortgagee has no title to the rents of the mortgaged premises which have been paid into court by a receiver appointed in a suit for establishing the will of the mortgagor. In that case Sir John Leach said, "a mortgagee is only entitled to such rents as accrued due while he is in possession of the mortgaged premises.—[The LORD CHANCELLOR called on plaintiffs' counsel to answer the case cited.]



The *Attorney General* and Mr. *Pigott*, Q. C., for the plaintiffs.—In that case the mortgagee was not a party to the suit, but presented a petition. We have filed our bill, and we say that from the time of the bill filed the rents are attached. The court said, in that case, the rents are not attached until the application is brought forward, but as soon as the application is brought forward the rents are attached: in like manner, when we filed our bill, that was equivalent to the petition presented in the case cited.

LORD CHANCELLOR.—I think the bill filed attaches all the rents which the receiver has received since the time of filing the bill.

Decree accordingly, as sought by the Attorney-General and Mr. *Pigott*.

—♦—  
Saturday, November 17.

### SHERIFFS' ACT—ELEGIT TWENTY-FOUR YEARS' OLD— JUDGMENT NOT REVIVED.

Lady CHARLOTTE MAHON, Petitioner.  
JOHN GIBBON FITZGIBBON and HUGH BRADY, Respondents.

An *elegit* which issued 24 years ago, and not since executed, is not such an *elegit* as will support a petition for a receiver under the Sheriff's Act.

Party who has gone into possession under an *elegit* must abandon the proceedings he has taken thereunder, before the court will grant him a receiver under the Sheriff's Act.

This was a petition under the 5 & 6 W. 4, c. 55, for a receiver, or that the receiver obtained by Brady, who was a mortgagee, should be extended to the matter of this petition. The petitioner was the executrix of John Mahon, who had obtained a judgment against the respondent, Fitzgibbon, in 1807, which judgment had been revived in 1814, and an *elegit* had then issued. A conditional order having been pronounced,

Mr. *Burroughs*, on behalf of the respondent, Brady, shewed cause, at the Rolls, why the conditional order should not be made absolute, on the ground that, by the petitioner's own shewing, it appeared that the debt was barred by the statute of limitations, no payment, or acknowledgment in writing, having been made for upwards of twenty years.

His HONOR held, that the proper course would be, under these circumstances, to move the LORD CHANCELLOR to set aside the conditional order. Accordingly,

Messrs. *Burroughs* and *Francis Fitzgerald* moved the LORD CHANCELLOR to set aside the conditional order;

But Mr. *Bland*, for petitioner, having stated that there were, in fact, payments on account, made within 20 years,

The LORD CHANCELLOR gave leave to prefer an amended petition; and that petition having been accordingly preferred, it was ordered that the same should be moved on notice, and now, on this day,

*Saturday, Nov. 17,*

The *Attorney-General* and Mr. *Bland*, for the petitioner, stated the matter of the petition and affidavit to verify, which set forth, that the judgment had been obtained in 1806; that an *elegit* issued in 1814; that a sum of £700 had been paid on account, in the year 1818; and that, in the year 1819, a further payment had been made; that £1259. 15s. 5d. was now due; that the rental of the lands, sought to be affected, was £600 a-year; that the original conusee was dead, and the petitioner his representative; and that Brady's mortgage was subsequent to petitioner's judgment.

Messrs. *Burroughs* and *Francis Fitzgerald*, for the respondent Brady.—This respondent has a mortgage executed in 1815, and has got a receiver under the mortgage act. The utmost value of the affidavit of the petitioner, stating payments on account, can only be this—to entitle the petitioner to an order of the court of law, for liberty to issue a *scire facias* to revive. The respondents will have an opportunity of pleading to the *sci. fa.* And until the judgment is duly revived, the petitioner is not entitled to sue out an *elegit*, and therefore has no right to a receiver under the statute. The remedy, given by this statute, has been described by the Master of the Rolls, as an equitable execution, and was plainly intended to be substituted instead of the remedy given by the statute of Westminster, this difference existing between the two remedies, viz.—that, at law, the judgment creditor could extend a moiety only; whereas a court of equity is enabled by this statute to appoint a receiver over the entire of the debtor's lands. But the creditor must be in a condition to elect, and must in fact elect, whether he will proceed at law or in equity: and on that principle, where the creditor has sued out an *elegit*, your lordship requires that he should enter a rule, vacating the award of the *elegit*, before a petition for a receiver will be filed. When the judgment is more than a year old, the court has no jurisdiction to appoint a receiver under this act, unless the judgment has been revived within the year: for, otherwise, the judgment creditor is not entitled to sue out an *elegit*. This has been so held in several cases; *In re Hovenden*(a); *Anon.* (b); *Anon.*(c). Here the judgment is 32 years' old, and has not been revived since 1814, and the conusee is now dead. The only question is this, does the circumstance that an *elegit* was issued in 1814 make any difference? And clearly it does not. That writ was returnable 24 years since, has not been exe-

(a) 6 Law Rec. N.S. 361.

(b) 4 Law Rec. N.S. 23.

(c) 6 Law Rec. N.S. 307.

valid, and valid too, now he executed. It is therefore not a writ of *elegit*, in strict terms, but whether might extend too soon, and therefore not within the words or the meaning of the statute.

*Attorney General* in reply.—The objection is that our *elegit* was issued in 1814. Let us intent to revive our *elegit*. [In our hands of any proceeding a party can take to revive an *elegit*.] *Learned Chamberlain*. They have a right to say it is a suspicious case, where time have been so passed without a judgment, and nothing but the belief of the court that the debt is due. [The court has kept the matter himself. The statements given in the verifying affidavit, are those which in a case of law would entitle us to revive our judgment; and moreover, we have actually issued our *elegit*. The words of the statute are, "any person entitled to sue out, or who has already sued out a writ of *'elegit'*." It is said, we are not in a condition to sue out an *elegit*; but having actually issued our *elegit* is something stronger than being in a condition to issue one.

*Learned Chamberlain*.—This statute gives a very summary remedy, as against the estate of the lands of the debtor. The authorities cited go to show that a party cannot have this summary remedy under the statute, unless he has actually revived his judgment. The petitioner has not revived his judgment, and is not in a condition to issue an *elegit*. As to the *elegit* which issued in 1814, I will not act on an *elegit* sued out twenty-four years ago. If the party had gone into possession under that *elegit*, I would only give a receiver, on condition of abandoning all the proceedings under that *elegit*. In the exercise of the discretion vested in the court, in applying this summary remedy, I must refuse this application.

Petition dismissed.

## ROLLS.

*Friday, November 2d.*

### PRACTICE—PETITION.

*In re CUMMINS', Minors.*

Mr. MONAHAN said, that in this matter he was instructed to shew cause against a conditional order for an attachment, obtained on petition last term. There was, however, in this case, no petition to shew cause, and as some doubts were entertained that cause could be shewn without such petition, Counsel begged to be informed by his Honor was it necessary?—[MASTER OF THE ROLLS. It is: I have not jurisdiction without the petition.]—In the ordinary cases, as, for example, where there is a conditional order for a receiver on petition, it is held, that, under the new rules, and the act of parliament authorising them, a petition for shewing cause is unnecessary.

In the matter of minors, a party cannot come in to shew cause against a conditional order obtained on petition, without a further petition for that purpose.

MASTER OF THE ROLLS.—That act does not apply to this case.

*Monday, November 5th.*

### PRACTICE—INJUNCTION—92D GENERAL ORDER.

*LAMBERT v. LAMBERT.*

Mr. BREWSTER, Q.C., moved, on bill and answer, that the injunction to restrain the defendant from cutting timber, &c., obtained in this cause, might be continued to the hearing.

Mr. J. H. Blake, Q.C., took a preliminary objection. The bill in this cause was filed on the 28th of November, 1837, when the present injunction issued, till answer or further order. The answer was filed on the 4th of June last; but to that answer exceptions were taken, and regularly filed within the fourteen days, pursuant to the 92d general rule.

These exceptions are as yet undisposed of. The present application,

In an injunction cause, although the plaintiff except to the defendant's answer, whereby, under the 92nd General Order, the original injunction is continued until the exceptions are disposed of; Held, that

the plaintiff may move on the bill and answer, notwithstanding the exceptions, to continue the injunction

therefore, is improper, as it professes to be upon bill and answer, although the plaintiff, by his exceptions for insufficiency, says that we have not answered. The plaintiff must abandon either his exceptions or his present motion. If he thinks proper to abide by his exceptions, then, according to the 92d rule, there can be no need of any application until after the exceptions shall have been disposed of. But he should not be allowed in this way, as it suits his convenience, to treat our answer as sufficient and insufficient at the same time. If, in point of fact, the answer is insufficient, the court should not now pronounce any order upon it; for, *non constat*, that a complete answer would lead the court to the same conclusion. We are, however, quite ready to meet the present application upon the merits, if the plaintiff will render it regular by abandoning his exceptions.

*Mr. Brewster.*—We will not abandon our exceptions. I have never heard of such an objection as the present. It is certainly the common practice in this court, to move for the continuance of an injunction, without prejudice to exceptions pending; but if the court think it right, we are quite willing to postpone our application until the exceptions shall have been disposed of.

*MASTER OF THE ROLLS.*—I see no occasion for postponing the present application. Exceptions, no doubt, under the 92d rule, prolong the original injunction till they are disposed of; but that is no reason why the plaintiff may not now, if he thinks proper, make his present application. The practice of the court has always been to allow the plaintiff to move to continue the injunction, notwithstanding the exceptions pending, as the answer may be quite sufficient to entitle the plaintiff to carry the injunction, though insufficient for the charges in the bill and the general purposes of the suit.

[The motion was accordingly debated, but the discussion was merely as to the facts.]

*Monday, November 5th.*

**PRACTICE—57TH GENERAL ORDER—AMENDMENT  
OF BILL.**

**O'GRADY and others v. BARRY and others.**

This was an application for liberty to amend the bill in this cause, filed on the 13th of March, 1835, by stating the facts in the affidavit mentioned; and also for leave to take off the file the supplemental bill in this cause, filed on the 29th of September last; or for such other order, &c.

Mr. *J. H. Blake*, Q. C. stated the facts from the affidavit. The original bill in this cause was filed in 1790; and a decree to account was pronounced in July, 1803; under which the Master reported, finding £7,364 due in June, 1808. In 1809, there was a final decree, pursuant to the report. A supplemental bill was filed in July, 1817; and a further supplemental bill, being that now sought to be amended, on the 13th of March, 1835. To this last mentioned bill, the defendant, *J. H. Barry*, filed his answer on the 16th of March, 1836. In November, 1836, the original plaintiff died, when the suit was revived by the present plaintiffs. The last answer was filed on the 4th of January last, but issue has not as yet been joined.

On the 16th of January last, several documents, material in the cause, were discovered among the papers of Lord Guillamore, at his house; and a further discovery took place on the 28th of the same month. Copies of the newly discovered documents were prepared, and plaintiffs' counsel were requested to meet in consultation upon them; but, in consequence of the illness of some, and absence upon circuit of others of plaintiffs' counsel, the consultation did not take place until the 8th of May, when a supplemental bill was advised, and accordingly prepared, but was not filed until the 29th of September last, in consequence of the ill health of Lord Guillamore; as counsel were of opinion that unless the plaintiffs were able to examine Lord Guillamore, the supplemental bill would be unnecessary.

Issue had not been joined at the time of the discovery of the new matter, the supplemental bill of 29th of September last was therefore irregular; and it was necessary to obtain leave to withdraw said last mentioned supplemental bill, and to put the newly discovered matter in issue, by way of amendment.

The main question in the cause is, whether the defendant, *J. H. Barry*, after he came of age, assented to an engagement made by his father and mother with the plaintiffs in the original cause, to the effect,

Where newly discovered matter is material to the equity of the case, and the plaintiffs' delay is satisfactorily accounted for, this court will order a second amendment of the bill, on terms, although more than six weeks may have expired after all the defendants have answered, and before notice of the motion for such order.

that the plaintiffs should suspend proceeding upon the decree in that cause, upon the terms that their demand should be paid out of the real estate chargeable therewith, and which belonged to the said defendant, J. H. Barry.

The several newly discovered facts and documents all immediately referred to the said arrangement: the first of said documents being a memorandum in the hand-writing of Lord Guillamore, and appearing to have been written many years ago, setting forth the particulars of the arrangement entered into, shortly after the final decree, by Richard Harold, the father of the said J. H. Barry, with Lord Guillamore, acting on behalf of the plaintiffs in the original cause, for suspension of proceedings in that cause, upon the terms of payment of interest upon the plaintiffs' demand during the minority of the said J. H. Barry; and, that upon his coming of age, the entire demand should be paid off. The memorandum further stated, that proceedings under the final decree had accordingly been suspended; and that, pursuant to the said arrangement, several payments of interest had been made to the said Lord Guillamore, on behalf of the plaintiffs; and that some of said payments had been made by the said defendant, J. H. Barry, after he had come of age, and when he expressed his thanks to the said Lord Guillamore, for having used his influence to prevent the sale of his lands, and requested the continuance of the said influence until the said defendant, J. H. Barry, should raise funds for the discharge of the said plaintiffs' demands, which he said he was then doing.

The other documents were letters written by the defendant's father to Lord Guillamore, and referring to the payments made pursuant to the arrangement.

The affidavit further stated, that upon presenting the newly discovered documents to Lord Guillamore, his Lordship expressed his perfect recollection of all the facts to which they related, and that his Lordship is at present so much restored to health, as to be able to undergo the necessary examination respecting them; and that, until the discovery as aforesaid, the plaintiffs were wholly ignorant of the said several facts and documents, they being minors at the time of which the said documents bear date; and that the said newly discovered matter is material and necessary to the plaintiffs' case.

After the foregoing statement, the learned counsel submitted that the plaintiffs should be at liberty to amend the bill filed on the 13th of March, 1835, by thereby putting in issue the newly discovered facts and documents as set forth in the affidavit; and to withdraw the supplemental bill of 29th of September last. The newly discovered matter is plainly material; the delay of the present application for leave to amend is satisfactorily accounted for; and there can be no doubt the court has the authority to make the order here sought for, notwith-

standing the 57th general order, which requires notice of the application within six weeks after the last answer has been filed. *Milbank v. Stevens* (a).

Messrs. *Pigott*, Q.C., and *Collins*, Q.C., contra, contended that the 57th general order ought to be a conclusive answer to the present application; especially as they said that the demand, now sought to be enforced by this suit, is, at least as respects the defendant, J. H. Barry, very unjust.

His HONOR said he would consider whether, upon any, and what terms the present application could be complied with; and if so, that he would pronounce his order the next day.

*Tuesday, November 6th.*

His HONOR, referring to the application of the preceding day, in *O'Grady v. Barry*, said, that two questions arose upon the present application:—*first*, whether, in particular cases, this court could dispense with the strict observance of its general orders; and *secondly*, whether this is a case in which the court ought so to dispense, and allow the plaintiffs to amend their bill, notwithstanding that the notice of their present application had not been served within six weeks after the last answer filed, pursuant to the 57th general order. As to the first question, his Honor said, I have the authority of the settled practice in England, for saying, that these general orders, being framed for the general administration of equity, must always give way, when it appears to the court that the equity in any particular case requires it.

Now, I have looked into the bill, and find that the newly discovered matter is highly important and material to the plaintiffs' equity. The delay chargeable on the plaintiffs is satisfactorily accounted for; I shall therefore allow them to withdraw the supplemental bill filed on the 29th of September last, and, upon certain terms, to amend the bill of 13th March, 1835, by inserting the newly discovered matter. The order is—

Let the plaintiffs be at liberty to take off the file the supplemental bill, filed on the 29th day of September, 1838, they undertaking to pay to the several defendants therein any costs occasioned by the filing thereof. And it is further ordered, that the plaintiffs be at liberty to amend the bill, filed on the 13th day of March, 1835, by stating therein the several matters stated in the affidavit of John Bagnall, the plaintiffs' solicitor, filed the 27th day of October, 1838, to have been discovered



is the month of January, 1838, on the terms of the plaintiffs making such amendment within one week from the date of this order, and undertaking not to require the answer of any of the defendants, save the defendants, John Harold Barry and Richard Harold, to said amendments, and to file a general replication within ten days after full answers shall be filed by them to said amendments, and to appear at the hearing, without service of subpoenas. And it is further ordered, that the said plaintiffs do pay to the said John Harold Barry his costs of appearing on this motion, and abide their own costs in relation thereto.

NOTE.—The following appears to be the result of the decisions on the subject of the amendment of the bill, under the 54th and 57th General Orders of Nov. 1834:—

1st. The bill may be amended up to the time of filing the replication, but not after; except in special cases, as to which there does not appear to be any settled rule. In the case of *Nangle v. Bateman*, which came before the Master of the Rolls this Term, on demurrer to a supplemental bill, filed after issue joined and several witnesses examined, but before publication had passed—the grounds of demurrer were, that the supplemental bill contained matter not properly supplemental, being, in fact, a new case, raising a new and different issue from that already joined, and partly examined to by the parties. His Honor, upon the authority of *Colclough v. Evans* (a), allowed the demurrer, but without prejudice to the plaintiff applying to withdraw his replication, and amend the original bill (b). Subsequently, the application was made, and granted.

2d. Before answer, plea, or demurrer filed, the bill may be amended as of course in the office, as often as the plaintiff thinks proper.

3d. After answer, plea, or demurrer filed, and before replication, the bill may be amended *once*, without any rule or order for that purpose, and at any time; the 54th General Order being independent of the 57th. *Stewart v. Service* (c). But no second amendment, after answer, plea, or demurrer filed, can be made without special leave; and where there are several answers, &c., the plaintiff cannot amend once after each; but having amended after the first answer, he cannot amend again except by order of the court. *Malone v. O'Connor* (d); *Lord Louth v. Tisdal* (e). Further amendments, after answer, must be regulated in ordinary cases by the 57th General Order; but this order will be dispensed with whenever the justice of the case requires it.

(a) 4 Sim. 76.

(b) As to amended bill varying the issue, see *Peed v. Cussen*, 5 Law Rec. N.S. 141.

(c) 5 Law Rec. N. S. 296.

(d) 6 Law Rec. N. S. 1.

(e) 6 Law Rec. N. S. 5.

*Wednesday, November 7th.*

## PRACTICE—PETITION IN A CAUSE.

CORCORAN *v.* SPARROW.

Mr. W. BROOKE, Q.C., moved the petition on behalf of the receiver, that he might be at liberty to let certain premises in the occupation of the defendant; and also, that, before the letting, he might be at liberty to expend the sums of £10 and £20 respectively, upon the necessary repairs of two houses on the premises, &c.—[MASTER OF THE ROLLS. There was no occasion for the petition here; the application should have been in the ordinary way, by motion in the cause. I find, upon looking at the petition, that it was entered with the Lord Chancellor's Secretary upon the 26th of October; so that nothing could be gained by it, but multiplication of costs in the cause.]—The Lord Chancellor directed the petition to be moved before your Honor.

In a cause, where a petition is preferred in vacation, so near the Term that the application might as well be made in Term by a regular motion in the cause, the Master will not make any order on such petition.

MASTER OF THE ROLLS—Yes: because the petition was unnecessary. I must now desire the solicitors to understand that, for the future, where a petition is thus needlessly presented, I will not make any order upon it.

*Friday, November 16th.*

## PRACTICE—PETITION.

1ST W. 4, c. 60—5TH AND 6TH W. 4, c. 55.

JOHNSTON *v.* ANKETELL.\*

Mr. HUGHES moved that the order of reference in this matter to the Master, to appoint a new trustee, under the 1 W. 4, c. 60,† be renewed, it being now upwards of twelve months old.

The MASTER OF THE ROLLS, being about to grant the motion, inquired if this was not a petition matter, and whether or not there was any petition for the present application.

Mr. Hughes said there was not, as he understood, that in all petition cases, the first petition gave the court jurisdiction to deal with all subsequent applications in the same matter.

In all petition matters, except under the 5 & 6 W. 4, c. 55, every application subsequent to the original motion, must have a new petition for that purpose.

\* See ante, p. 1.

† See the original application in this matter, 5 Law Rec. N. S. 201.

**MASTER OF THE ROLLS.**—It would have been well if the several acts of parliament, giving the jurisdiction in matters by petition, had contained a clause, making the first petition sufficient for the purpose of jurisdiction, in all the subsequent applications in the matter: but the 5 & 6 W. 4, c. 55, is the only one of these acts making such provision. You must therefore have a petition for the purpose, before I can make any order in this matter.

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*Monday, November 19th.*

**SOLICITOR—APPOINTMENT OF, BY MINOR PLAINTIFFS,  
ON ATTAINING THEIR AGE.**

**BENNETT and WHEELER, and others, v. WHEELER, and others.**

Where there was an order of court appointing a solicitor for a number of minor co-plaintiffs, the court, on the application of some of those who had come of age, varied the former order, and permitted them to appoint their own solicitors respectively.

**Mr. T. WHEELER**, moved on behalf of three of the plaintiffs, **Robert Wheeler, Thomas Wheeler, and Adelaide Bott**, that the order made in this cause on the 29th of May, 1827, appointing **Richard Bennett**, solicitor for the plaintiffs in these causes, be varied; and that the said **Robert and Thomas Wheeler, and Adelaide Bott**, be at liberty to appoint **R. Wogan and Co.**, as their solicitors, instead of the said **R. Bennett**, in said order named; or, for such other order, &c.

To ground the present application, the plaintiffs, **Robert and Thomas Wheeler**, made an affidavit, stating, that in the month of May last, a decree was pronounced in this cause, whereby, after directing payment of the several creditors therein mentioned, amongst other things, it was ordered that the Master should allocate the residue of the fund in court to the credit of the cause amongst the children of **George Wheeler**, deceased, and those deriving under them, (being the co-plaintiffs) in the proportion in the report particularly mentioned; subject however, to certain costs therein specified; as to which, it was thereby ordered, that the Master should debit the children of the said **George Wheeler**, with their respective shares of such costs. It was further ordered, that all other due credits and allowances be given and taken in making of such allocation.

The affidavit further stated, that the said **Richard Bennett**, being one of the co-plaintiffs, was, by an order bearing date the 29th of May, 1826, appointed solicitor for the plaintiffs in this cause, all of whom, excepting the said **Bennett** and wife, were then minors, and that the said **Bennett**, being married to one of the daughters of the said **George Wheeler**, has, in right of his wife, an interest in the funds to be allocated under said decree; and that the said **Bennett** and wife, having

been guardians of the persons of the minor co-plaintiffs during their minority, have made considerable claims against them, which deponents deny their liability to.

That all of the children of the said George Wheeler, deceased, excepting one, have obtained their full age of twenty-one years; and that with the exception of the remaining minor, and of Bennett and wife, all the co-plaintiffs join in making the present application, as the account is now about to be taken pursuant to the decree, and for the foregoing reasons, the deponents believe that their interests would not be sufficiently protected by the said Richard Bennett.

Mr. *Dickson*, Q. C., for Bennett, objected to the present application that it was unnecessary; as, in fact, the present applicants already had their own solicitor, by whom their business was done. Having two solicitors on record would be highly inconvenient.

Mr. *Hughes*, for the defendants, who had obtained the carriage of the decree, said that immediately after the present applicants had given notice of their objection to Bennett, and that they had appointed Wogan and Co., as their solicitor, duplicate notices, summonses, &c. were served upon both Bennett, and Wogan and Co., for the plaintiffs; but that his clients objected, as they might not be allowed the costs for so doing.

MASTER OF THE ROLLS.—The like difficulty to that arising in this case, I remember, came under the consideration of the late Master of the Rolls, in the case of *O'Dell, v. O'Dell* (a), and was subsequently considered by me, in the case of *Waters v. Waters* (a). I have always thought it would be extremely hard, if minors, upon coming of age, should not be allowed to appoint their own solicitor; and I think that the inconvenience, whatever it may be, of having two solicitors on record for the plaintiffs is less than that arising from what, I must say, would be the great injustice of not allowing the minors, on coming of age, to appoint their own solicitor. I shall therefore make the order as sought.

Motion granted.

(a) These cases are not reported.

*Tuesday, November 20th.*

## SALE UNDER DECREE—CONDITIONS OF.

BENNETT and WHEELER, *v.* WHEELER and others.

The court will not set up a title, knowing it to be bad; therefore when the court is apprised of a defect of such a nature, that if of any importance, it must render the title not merely defective, but absolutely bad; though the court may deem it unimportant, it will not by a condition of sale, preclude objection to such defect. An unimportant defect needs no condition of sale, nor in such case, will the court make one.

Mr. HUGHES, on behalf of George Nelson Wheeler, Esq., who had the carriage of the decree in these causes, moved that the lands of Buttermountain, in said decree directed to be sold, should be set up to be sold, subject to the following conditions of sale:—1st. That the purchaser shall not be at liberty to require the deduction or authentication of the title of the lessor in the lease of 3d May, 1774; but shall assume that the lessor had a right to execute that lease. 2d. That the purchaser shall be satisfied with a copy of the judgment of Easter Term, 1815, in the cause of lessee of *Parvisol v. O'Dell*, and an affidavit of the possession of Alderman George Wheeler, deceased, and his representatives, from 1815, to the present time, as conclusive evidence of the due eviction and determination of the lease of 28th of April, 1810: or, that it be referred to John Sealy Townsend, Esq., the Master in these causes, to settle conditions of sale, &c.

The affidavit for the present application stated, that the deeds had been lodged in the Master's office; that the title to the estate to be sold was under the lease of 3d of May, 1774, made between one Ulick Allen of one part, and William Bathurst, George Parvisol, and Thomas Billing, of the other part, whereby the said Allen granted &c., to the said Bathurst, Parvisol, and Billing, and to their heirs, executors, and administrators and assigns, the said lands of Buttermountain, containing, &c., and situate, &c., to hold to the said lessees, and to their heirs, executors, administrators, and assigns, for the lives of the said lessees, and the life of the survivor of them, and also, for the residue of the term of 900 years, from the 1st of May, then instant, which should remain after the death of the survivor of the said three lessees, subject to the yearly rent of £80; that the entire estate and interest in the said lease afterwards became vested in Parvisol; and that Parvisol assigned same, for full consideration, to Alderman George Wheeler.

That none of the title deeds of Ulick Allen, the lessor, are forthcoming; and that, considering the small value of the estate to be sold, the expense of making out Ulick Allen's title would be injurious to the parties in the cause.

That in the progress of preparing the statement of title, under the said lease of 1774, an under-lease was discovered, bearing date the 28th of April, 1810, made between the said William Parvisol, and one Charles Ball, of the county of Dublin, whereby the said Parvisol had demised unto the said Ball, his executors, administrators, and assigns,

all the said lands of Buttermountain, with their appurtenances, to hold to the said Ball, his executors, administrators, and assigns, for the full term of 860 years, to commence from the 1st day of May, then next ensuing; yielding and paying thereout, to the said Parvisol, his executors, administrators and assigns, the yearly rent of £545, &c. That the said lease had been duly registered on the 28th of April, 1810. That upon further inquiry it was stated, that this last-mentioned lease had been duly evicted in the year 1815, when the said Parvisol, had brought an ejectment in the court of Exchequer, for that purpose; and that upon search, it was discovered, that in Hilary Term, 1815, the said Parvisol did bring an ejectment to evict the said lease for non-payment of rent; and that on the 2d of May, 1815, a rule was entered in said cause, ascertaining the rent due, to the sum of £1157. 10s.; and that in Easter Term, 1815, the said Parvisol obtained judgment in said cause; but that, notwithstanding the most minute search in the proper office, no writ of *habere* in said cause, nor any return upon or in respect of same could be found; and that as all the parties cognizant of the facts are now dead, there are no means of proving that possession ever was duly taken under the said judgment in ejectment.

MASTER OF THE ROLLS.—There is no occasion here for any reference to the Master. I will give you the first condition you ask for, viz:—that the purchaser shall not be at liberty to require Ulick Allen's title; but I see no reason for the other.

Mr. *Hughes*.—My lord, the occasion for the second condition we propose arises from the law as laid down by Mr. Justice Burton, in *Townsend v. Ejector* (a), that judgment in ejectment is no proof of eviction; so that we have no proof that this lease of 1810, for 860 years and duly registered, is not in the way of our title to the possession.

MASTER OF THE ROLLS.—You had better not raise an objection of this kind, which, if well founded, would prove your title absolutely bad. In such a case, I would not give you any condition of sale: for it is the uniform practice of a court of Equity, the principle of which was much discussed in *Piers v. Piers*, not to set up for sale a title, knowing it to be bad. But admitting what was said in that case in the court of Queen's Bench, I do not see that it applies here. In that case, the judgment in ejectment was not followed by twenty years of undisturbed possession; and there the question relating simply to the effect of the judgment was very different from the present. Here it appears that possession was taken just about the time when it might have been taken under the judgment in ejectment; and we have the judgment in the ejectment followed immediately by twenty-three years of undisturbed possession.—At any rate, you are in this dilemma: either you have a good

(a) Alc. & Nap. 228.

title not requiring a condition of sale : or, your title is bad, and the court would not set it up.

As I have already said, I will give you the first condition, but not the second, of which, I think you have no need. For my part, I would think a judgment in ejectment, followed by three and twenty years possession, a very good title.

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*Tuesday, November 20th.*

### RECEIVER—MOTIONS BY.

O'CONNOR and others *v.* MALONE and others.

A receiver should not meddle with the rights of parties in the cause.

A motion by a receiver, that it be referred to the Master to inquire and report whether any, and what sum be due on foot of a certain mortgage of the lands in the pleadings mentioned, &c. and whether it would not be for the advantage of the parties, &c. that the receiver should make certain payments on account of any sum reported due, will be refused, with costs.

Mr. MONAHAN, on behalf of the receiver, moved that it be referred to the Master to inquire and report whether any and what sum remains due for principal, interest, and costs, on foot of a certain mortgage of a certain part of the premises in the pleadings mentioned, bearing date, &c., and executed by the Right Honorable Anthony Malone to the Rev. Edward Ledwich and William Ruxton, and the judgment collateral therewith; and if the Master shall report, that any sum remains due on foot thereof, he shall report the particulars of same, and to whom payable, and whether it would be for the benefit of the parties in this cause that the sum remaining due for principal, interest, and costs, on foot of the securities aforesaid, or any, and what part thereof, should be paid off and discharged, and what are the funds properly applicable to pay the same, &c.; and whether it would be for the benefit of the parties that the receiver should pay, &c. &c.

For the present application, one of the plaintiffs made an affidavit, stating, according to his information and belief, the circumstances connected with the mortgage; and that the principal sum is still due, and that it would be for the benefit of the parties in the cause, that it should now be paid out of the funds in the hands of the receiver, and that a reconveyance should be executed.

Serjeant *Greene* and Mr. *Blood*, for the defendants, insisted that the present application should be refused, with costs, as the receiver had no right whatever to make it; and, according to the statement in the affidavit for the motion, it was at least doubtful whether his Honor could grant such an application, no matter from whom it came: for, the deponent states he is informed, and believes, that Ledwich and Ruxton were trustees of the Jervis-street Hospital, in the city of Dublin, and that the money, advanced by them on the said mortgage, was part of the funds of

mid Hospital, advanced by them as such trustees, *although no declaration of such trust appears in said deed.*

**MASTER OF THE ROLLS.**—This application must be refused. It is highly improper for a receiver to interfere in this manner. If the present application came from the plaintiffs or defendants, or any one having an interest in the matter, I could understand it; but the receiver has no business in it. I must refuse this motion, with costs.

**Mr. Monahan.**—My Lord, there can be no doubt that it is for the interest of the parties that this mortgage should be paid off. It is the oldest incumbrance affecting the estate; interest has been regularly paid in at 6  $\frac{1}{2}$  cent. until the last two years; and the trustees of the Jervis-street Hospital have been making frequent applications for payment of the interest in arrear.

The Solicitor for the receiver stated, that although the present application had been made on behalf of the receiver, it was with the full concurrence of the plaintiffs, and that the plaintiffs were ready to give notice of this motion on their behalf.

**MASTER OF THE ROLLS.**—Then let the plaintiffs forthwith give notice of this motion; and for the present, I will defer the consideration of the costs of the present application; but I wish receivers to understand that they are not to make applications of this kind (*a*).

(*a*) See *Comyn v. Smith*, 1 Hog. 81; *Martin v. Executors of Walker*, 1 Sausse & Scully, 139.

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*Saturday, November 24th.*

### INJUNCTION—EJECTMENT FOR NON-PAYMENT OF RENT.

CLANCY v. ROBERTS.

**Mr. COLLINS, Q.C.**, for the plaintiff, moved for an injunction to restrain the defendant from proceeding to execute the *habere*, in the action of ejectment for non-payment of rent, brought by him, to recover possession of the lands in the plaintiff's possession, and to evict the lease, &c. According to the case made by the bill, it would appear, upon a fair account between the parties, that no rent was really due; and the interest in the lease, which was for a term of 600 years, was valuable.

Only in a strong case, if at all, would the court grant an injunction to restrain proceedings in ejectment for non payment of rent.



*Mr. B. Lloyd, contra.*—The defendant insists that there are two years' rent due; and upon looking into the account, it is very plain that such is the fact. But, independently of the account, there are two difficulties in the way of the present application :—*First*, Clancy is a discharged insolvent, all his property being vested in his assignee, who alone took defence to the ejectment; and therefore Clancy has no business here at all. *Secondly*, the ejectment statutes have limited the time within which lessees, evicted for non-payment of rent, must redeem the lands, to six months from the time of executing the *habere*. Till the *habere* is executed, the time does not begin to run; and therefore, an injunction to restrain the execution of the *habere* must necessarily enlarge the time limited by the statutes, within which the tenant must redeem.

**MASTER OF THE ROLLS.**—I must refuse the present application, with costs. If the court could be induced at all, which is very doubtful, to grant an injunction to restrain proceedings in ejectment for non-payment of rent, a very strong case, indeed, would be required.

Motion refused, with costs.

*Saturday, November 17th.*

#### AMENDMENT—SUIT BY A MARRIED WOMAN— PLEADING—PARTIES.

**SWEENEY and others, v. HALL, and others.**

One of a number of co-plaintiffs cannot be withdrawn from the record, without first giving security for by-gone costs.

*Seemle*—A suit by a married woman, suing for her separate estate with her husband, as co-plaintiff, is a misjoinder. *Query*—Is it such a misjoinder as might be objected to successfully at the hearing of the issue?

In this cause, the defendant Robert Hall served notice of motion to dismiss the bill for want of prosecution; immediately afterwards the plaintiffs served notice of motion for liberty to amend the bill.

*Mr. Litton, Q. C.*, for the plaintiffs, now moved for liberty to amend the bill, by striking out the name of John Sweeney the elder, as a plaintiff, and making his assignee a party defendant, the said J. Sweeney the elder, having become insolvent since the commencement of the suit; and also, by making the plaintiff Elizabeth Sweeney, to sue by John Sweeney, the younger, as her next friend; and also by striking out the name of the said John Sweeney, the younger, as a plaintiff in his own right. This now sought was a further amendment; but all the defendants had not yet answered.

The application was grounded upon an affidavit stating the insolvency of Sweeney the elder; that the bill had been filed on behalf of the plaintiff, Elizabeth Sweeney, suing for her separate estate; that the delay had been occasioned by the doubts which had arisen respecting the

frame of the bill, and the want of funds to carry on the cause; that the solicitor had lately obtained funds for this purpose; and that the plaintiffs were advised the amendments now sought were material.—No injury can arise from the amendments sought: no further answer will be required; and after the amendment, the plaintiffs will file their replication forthwith: they would do so now, if they could do it, without fear of being turned round upon a point of pleading when the cause comes on to be heard.

A married woman suing for her separate estate with her husband, as co-plaintiff, is a fatal misjoinder: *Wake v. Parker* (a).—[MASTER OF THE ROLLS. The objection there was on demurrer; but I doubt that it could be sustained at the hearing of a cause. I remember the point having been raised at the hearing and overruled, in a case before Sir Anthony Harte.]—In *Glyn v. Soars* (b), it is said, that such misjoinder is good ground of objection at the hearing; it is to be admitted however that this is only a *dictum*. However, the husband has become insolvent, and it is necessary to bring his assignee before the court.

Mr. *W. Brooke*, Q.C., for the defendant, Robert Hall, contra.—Mr. Litton has omitted to mention, that the notice of this present application was not given until after my client had given notice of his motion, which I now move, to dismiss the bill with costs, for want of prosecution. The bill was filed in 1837, and our answer in November, 1837. That answer shews, conclusively, that there is no ground for this suit.

The objection now raised by the plaintiffs, to their own pleading, is merely an expedient for delay; the defendant having answered, could not now object. *Raffety v. King* (c). The joinder of parties here objected to is according to the common practice of the profession; and it is at least doubtful that *Wake v. Parker* can stand. But there the question was on demurrer; and though it be maintainable in that way, it is not at the hearing. Your Honor's recollection of the case before Sir Anthony Harte is quite correct; that is the case of *Laird v. Tobin* (d): in which the case of *Horan v. Wooloughan* (e) is cited; but it is now proposed that Elizabeth Sweeny shall sue by her son, J. Sweeny, as her next friend. Now, the next friend of a married woman must be a solvent person. *Kelsal v. Kelsal* (f); *Squirrel v. Squirrel* (g).—But in the plaintiff's own affidavit, it is admitted that J. Sweeny, jun. has also been discharged as an insolvent. At any rate, the party or parties now to be withdrawn from the record must first give security for costs.

(a) 2 Keene 59 id. 70.

(b) 5 Myl. &amp; Kee. 470.

(c) 1 Keene, 601.

(d) 1 Mol. 546.

(e) 1 Beat. 1.

(f) 2 Myl. &amp; K.

(g) 2 P. Wms. 207. (n)

**Mr. Litten.**—Sweeny, the elder, was discharged as an insolvent the other day, and cannot give security.

**MASTER OF THE ROLLS.**—You cannot take a plaintiff off the record, without giving security for the bye-gone costs.

Let the plaintiff, within a fortnight, give security by recognizance, with sufficient sureties, to be approved of by the Master, for the bye-gone costs ; and upon production, at the Rolls' office, of the certificate of the enrolment of such recognizance, let the plaintiffs be at liberty, within two days after the time limited for giving security, to make the amendments as sought ; and let them, within two days after such amendment, file their replication ; and in default of security within the fortnight, let the plaintiffs file a replication within two days after the expiration of the fortnight ; or in default of the replication, as hereinbefore directed, let the bill, as against R. Hall, be dismissed, with costs, for want of prosecution, &c.

## EQUITY EXCHEQUER.

*Monday, November 5th.*

## CREDITOR—COSTS.

*Executors of MAGUIRE v. DUNDASS and others.*

This was an application, on behalf of the plaintiffs, that the Remembrancer might, in proceeding under the order of the 5th of December last, to allocate the funds in the bank to the credit of the cause, report the priorities of the different parties entitled to said funds, and that it might be referred to the Remembrancer to tax and ascertain the amount of the plaintiffs' costs; and that when the same should be so taxed and allocated, the Remembrancer should be directed to allocate, in the first instance, and in priority of the demands of any of the parties or creditors in this cause, a sum sufficient for the payment of plaintiffs' costs, incurred subsequent to the pronouncing of the final decree.

The bill in this case was filed by the plaintiffs' testator, who was a judgment creditor, on behalf of himself and other creditors, against the heir and personal representative of the late Francis Dundass, praying for a general administration of his assets.

The usual decree having been pronounced, the lands and premises in the pleadings mentioned were, in the month of June, 1833, set up and sold, and the sale duly confirmed.

It was stated, in the affidavit made in support of the application, that the plaintiffs had been put to considerable expense in effecting the sale, and making out the title to the real estate; and that such proceedings had been taken with the assent and knowledge of all the parties in the cause.

It was further stated, that by orders, bearing date respectively the 3d of February, 1834, and the 18th of May, 1835, the court directed the payment of the sums of £130 and £60 to plaintiffs' attorney on account of the costs, and for the prosecution of the cause. It was also stated, that the fees on the final decree in the cause amounted to £34. 19s. 2d. By order, bearing date the 5th of December, 1837, it was referred to the Remembrancer to allocate the funds in bank to the credit of the cause, among the parties, plaintiffs and defendants, and the creditors. It appeared that, in proceeding under this order, it had been ascertained that the fund would not reach the plaintiffs, and that the Remembrancer was of opinion that the plaintiffs were not entitled to the costs, save as of priority with their demand.

In a creditor's suit for the general administration of the debtor's real and personal estate, where the plaintiff, after final decree, was permitted by the parties to proceed with the cause, and thereby incurred considerable costs in making out title—*Held*, that notwithstanding the funds realized by the sale did not reach the plaintiff's demand, he was nevertheless entitled to be paid, in priority to the demands of the other creditors, the costs incurred subsequent to the decree, and in making out title, regard being had to the *bona fides* of the proceeding, and whether the same was useful to the other parties or creditors.

Mr. *Lilton*, Q.C., for the plaintiffs.—As the decree directs that the plaintiffs shall be paid their costs according to the priority of their demand, they do not apply for the costs prior to the decree. Unless they applied to have the cause re-heard, the question with respect to those costs could not now be opened, although it is apprehended that, according to the practice of the court, the plaintiffs would have been entitled to them, had the point been raised at the hearing.

They now only seek for the costs subsequent to the decree, which were incurred for the benefit of all parties, in making out the title to the lands. It appears from *Tootal v. Spicer* (a), and several other cases, that the practice, with respect to the costs in such cases, is perfectly settled in England.

Mr. *James Shiel*, on behalf of the executors of Wm. Hall, a prior judgment creditor, who had proved his debt under the decree, opposed the motion. This application cannot be sustained. In the first place, the plaintiffs are premature in bringing it forward. Without waiting for the officer's report, they now attempt, by this motion, to prevent him from exercising his judgment on the case. As to the sums which the court, by its orders, directed to be paid to the plaintiffs' attorney, the money was advanced, upon an express undertaking, that it should be applied in making out the title, whereas it appears it was applied to other purposes. Besides, the creditor for whom I appear had no notice of the motions on which those orders were obtained, as notice was only served on the parties in the cause. The sale did not produce more than £3,000, and the debts prior to the plaintiffs' demand considerably exceed that sum. Plaintiffs' debt was only a sum of £100 Irish, so that it is evident that this suit was a mere speculation on their part. But, in any event, they are bound by the terms of the decree.—[PENNEFATHER, B. That only concludes them up to the time of its being pronounced.]—The practice in this court and in Chancery is the same in cases of this kind; and, in Chancery, it is now settled that a puisne creditor can derive no benefit from the suit until the funds reach him.—[PENNEFATHER, B. True, he can derive no benefit; but is he to sustain a loss?]  
—In *Taylor v. Gorman*, reported in a note to *Peyton v. M'Dermott* (b), although the defendants, who stood in the same situation as the plaintiffs, had, by their conduct, greatly increased the expenses of the suit, which, in its result, was altogether for their benefit, it was, notwithstanding, held, that the plaintiff was only entitled to be paid his costs according to the priority of his demand. And in *Peyton v. M'Dermott*, the Chancellor said, that formerly the plaintiff got his costs without any reference to the priority of his claim; that during the time of Lord

(a) 4 Sim. 419.

(b) Drury &amp; Walsh, 235.

Manners, the practice was different, and the plaintiff was decreed to be paid his costs according to the order and degree of his debt; that this was again changed by Sir A. Harte, but that since that period, the practice which prevailed in the time of Lord Manners had been restored, and universally acted upon.

PENNEFATHER, B.—I am very far from saying that the practice has been settled as Mr. *Litton* has assumed, and that the puisne creditor would have been declared entitled to his costs, if the subject had been mentioned at the time of pronouncing the decree. It would be a practice affording great encouragement to the institution of improvident suits, if the creditor who first obtained a decree were sure to get his costs. With respect to those cases, in which it is said, that where the plaintiff realizes a fund for the benefit of all parties, he should get his costs; the question is, what is the meaning of realizing a fund? If the fund consist of real estate which is always forthcoming, on which the incumbrances are a lien, and which cannot be secreted or withdrawn from the reach of creditors, it cannot be said that such a fund has been realized by the creditor who has instituted the suit by which it has been made available. But where the fund is of a mixed or personal nature, which is to be collected, perhaps, with difficulty, and a single contract creditor files a bill, and, by his diligence and exertions, renders the fund available; in such a case, it may be truly said, that the creditor has realized the fund. In the present case there must have been an actor. If the plaintiff, after the sale, finding that the funds would not reach him, had refused to proceed with the cause, some other party must have become the actor, and proceeded to make out title, which being for the benefit of all parties, he would have been entitled to his costs. The plaintiff has acted for the benefit of the other creditors. This case falls within the principle of the distinction of which I have been speaking.

The COURT then made the following order:—

Refer it to the Chief or Second Remembrancer, to inquire and report what costs the plaintiff is entitled to, subsequent to the final decree, and in making out title; and on such inquiry, the Chief or Second Remembrancer to have regard to the *bona fides* of the proceeding, and whether useful to the other creditors; and let the said Chief or Second Remembrancer tax such costs as he shall be of opinion that the plaintiff is so entitled to, and charge him with such sums as have been received out of the funds by the plaintiffs or their attorney, the executors of Hall to have notice of said proceeding; and if the said Chief or Second Remembrancer shall find that any sum remains due on foot of such costs, let him allocate a sum sufficient for the payment thereof, in priority to the demands of the other parties or creditors.

Mr. *Litton* applied to have the costs of the motion included in the order, observing, that if they were made costs in the cause, the plaintiffs would never recover them.

PENNEFATHER, B.—The plaintiffs are not entitled to have the costs of this motion included in the order; they can have them only as costs in the cause. After the sale, the plaintiffs should have served a notice, calling on the other parties to proceed with the cause, and stating that if the plaintiffs proceeded, they would seek the costs of doing so.

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*Saturday, November 10th.*

### PRACTICE—SEQUESTRATION.

GRAVES *v.* FENNELL, and others.

There cannot be separate sequestrations for debt and costs.

Plaintiff permitted to execute a sequestration for the costs on the terms of his waiving any further proceeding against the defendant for the sums reported and decreed due.

Mr. GRAVES moved that the plaintiff might be at liberty to execute the writs of sequestration obtained against the defendants, J. Fennell, T. L., &c., and also that a writ of assistance might issue, directed to the sheriff of the county of Cork, to aid the sequestrators named in the said writs, or any two or more of them, in the execution of said sequestrations.

This is a suit for the recovery of tithe composition, and the sequestrations have been obtained on final decree.

It is sworn by the sequestrators, that it is impossible to execute them without a writ of assistance.

PENNEFATHER, B.—It appears on the face of the sequestrations that they are for costs; regularly, they ought to be for both debt and costs. If these sequestrations were executed for the costs, the plaintiff might afterwards issue others for the debt, which would be harrassing the defendants by two separate executions. If the plaintiff be permitted to execute these sequestrations, it must be upon the terms of his consenting to wave any further proceedings for the debt.

Plaintiff's counsel consenting to these terms,

*Per Curiam.*—Grant the motion, the plaintiff waiving any proceeding whatsoever, for the sums reported and decreed due against the said several defendants.\*

\* NOTE.—Process of sequestration is two-fold; mesne and judicial. It issues as mesne process on the defendant's default in not appearing or not answering, after the whole process of contempt has been spent against him; as a judicial process, it issues in pursuance of a decree, and to enforce the performance of it. In the latter case it is said to be analogous to an execution at law.—See 2 *Howard's Equit. Ex.* 773.

*Saturday, November 10th.*

## INJUNCTION—TRESPASS—WASTE—EJECTMENT.

SANDYS v. MURRAY and others.

Mr. O'CALLAGHAN moved, according to the prayer of the bill filed in this cause, for an injunction to restrain the defendant from cutting, removing, or taking away, any turf from a certain bog in the bill mentioned, under the following circumstances, which he stated from the affidavit verifying the bill :—

The plaintiff was entitled, under a settlement, to an estate for lives renewable for ever, in three undivided fourths of the lands of Drumna-cor and Lower Gurteen, in the county of Cavan, and was in possession of the former denomination, subject to a mortgage, which he had granted of his entire interest in both.

The persons from whom the plaintiff derived his title had, in the year 1806, demised a part of the lands of Lower Gurteen, containing about 134 acres, to one Daniel Murray, for three lives, with a covenant for perpetual renewal.

In March, 1835, the plaintiff and the other persons entitled to the remaining undivided fourth of these lands joined in executing a renewal to the principal defendant, John Murray, to whom, or in trust for whom, the interest in the lease of 1806 had been devised by his father, Daniel Murray, the original lessee.

The lands of Lower Gurteen, comprised in the lease of 1806, and the renewal of 1835, are bounded on one side by a certain high road, on the other side of which is an extensive bog, containing about 150 acres, and adjoining and annexed to the lands of Drumna-cor, which continue in the possession of the plaintiff.

The plaintiff had been in the habit of allowing his tenants in the neighbourhood to cut turf, from this bog, for their own consumption; and he had permitted, among the rest, the said Daniel Murray, in his lifetime, and his undertenants on the lands of Lower Gurteen, to cut turf therefrom, in such quantities as their own consumption required.

By the cutting away of the turf, a part of the bog, making about eleven acres, had been reclaimed, and rendered fit for tillage and pasture.

Daniel Murray, shortly before his death, and the defendant, John Murray, since the death of the former, had respectively taken upon themselves to set, from time to time, the part of the bog thus reclaimed; and John Murray was now in receipt of rents paid by the persons to whom the same had been so let.

A demised certain lands to B., and for some years allowed B. and his undertenants to cut turf out of a bog adjoining the lands demised. Some acres of the bog having been reclaimed, B. took upon himself to set them, alleging that they formed part of the lands demised to him by A. In 1836, A., by written notice, demanded possession of the land reclaimed, and withdrew from B. and his undertenants the permission he had previously given them to cut turf from what was left of the bog. In the summer of 1838, he brought an ejectment for the recovery of the reclaimed acres, and as B. and his undertenants still continued to cut turfs before, he filed his bill, pending the ejectment, for an injunction to restrain them from so doing. The injunction was refused, as the

case was not one of sudden and irreparable injury; and, unless to prevent sudden and irreparable injury, this court will not interfere in a case of trespass.



In September, 1835, the plaintiff, by written notice, required the defendant John Murray, and his undertenants, to give up the possession of that part of the bog which had been reclaimed; and, by the same notice, distinctly withdrew and revoked the permission to cut turf out of the said bog, which he had continued to give them until then, and cautioned them against cutting any thenceforward.

This notice the defendants disregarded, and still withheld from the plaintiff the possession of the reclaimed portion of the bog; and for the recovery of this the plaintiff had lately brought an ejectment, which was now at issue (defendant John Murray having taken defence), but could not be brought to trial until the next Spring Assizes.

In further verification of the bill, the affidavit stated that the defendants, John Murray and his undertenants, both before and since the bringing of the ejectment, had been cutting turf out of various parts of the bog in much larger quantities than their own consumption could possibly require, pretending, contrary to the fact, that the bog formed part of the lands comprised in the lease of 1806, and the renewal of 1835; that they still continued to do so, although the plaintiff's permission had been withdrawn, which permission (the plaintiff charged,) formed the only title that any of them ever had to cut turf out of any part of it; and that as the turf-cutting season was then setting in,\* the plaintiff was apprehensive that, unless restrained by the injunction for which the bill prayed, the defendants would very much diminish the present value of the bog, and deteriorate the plaintiff's property therein.

PENNEFATHER, B.—This is no case for an injunction.

Mr. O'Callaghan.—It is a case of trespass, it is true, not of waste; but it is now clearly established, that a court of Equity will exercise the same jurisdiction in cases of trespass, which it has always exercised in cases of waste, and interfere by injunction, and direct an account in the one case as in the other. *Flamange's Case*, cited and followed by Lord Eldon, in *Mitchell v. Dors* (a). Those cases are directly in point. Nor does the defendant's pretence of title prejudice the plaintiff's right to the injunction. *Kinder v. Jones* (b); *Thomas v. Oakley* (c). It would have been formerly otherwise, per Lord Eldon, in *Norway v. Rowe* (d); but it is now as clearly settled, that the court will grant an injunction in cases of trespass committed under color of an alleged right, as that it will do so, in analogy to its jurisdiction as to waste, in cases of mere trespass, where no preterfice of title is set up. The cases to be

\* The bill had been filed, and the affidavit sworn early in August.

(a) 6 Ves. 147.

(b) 17 Ves. 110.

(c) 8 Ves. 184.

(d) 19 Ves. 144.

found on this subject do not, indeed, relate to the kind of property sought to be protected here; but that can make no material difference. In *Thomas v. Oakley*, where the application was made for an injunction to restrain a tenant from trespass, by exceeding a limited right to take stones out of a quarry,

Lord Eldon, after observing on the class of cases in which the authority of *Flamange's Case* had been followed, proceeds thus:—"If this protection would be granted in the case of timber, coals, or lead ore, why is it not equally to be applied to a quarry? The comparative value cannot be considered. The present established course is, to sustain a bill for the purpose of injunction, connecting it with the account in both cases,"—(*i. e.* in the case of trespass as well as in the case of waste)—"and not to put the plaintiff to come here for an injunction, and to go to law for damages."

PENNEFATHER, B.—The Court will never interfere in a case of trespass, unless to prevent sudden and irremediable injury. The acts of trespass stated in your affidavit have been going on for some years, and we will leave you now to the ejectment you have brought for the eleven acres that have been reclaimed; and if you wish to try the right of the defendants to cut turf out of the rest of the bog, you can do so by an action of trespass. Where a party exercises a right, which is disputed, in a manner tending to the destruction of the property, or likely to cause irreparable mischief, there the court will interfere; but this is not such a case. The season, too, for cutting turf is over; they cannot do you much injury between this and the assizes.

Mr. O'Callaghan.—We seek, at least, to restrain them from removing the turf which now lies cut upon the bog.

PENNEFATHER, B.—We shall certainly not grant an injunction for that purpose merely. We leave you to your remedies at law.

No rule.\*

\* NOTE.—See, in addition to the cases cited by counsel, *Robinson v. Lord Byron*, 2 Bro. C. C. 583; *Hanson v. Gardiner*, 7 Ves. 308; *Grey v. Duke of Northumberland*, 13 Ves. 236; Same case again, 17 Ves. 281; *Crockford v. Alexander*, 15 Ves. 129; *Earl Cowper v. Baker*, 17 Ves. 128; *De Salis v. Crossan*, 1 Ball & Beat. 186; *Field v. Beaumont*, 1 Swanst. 208. Query—Whether the court will interfere, by injunction to stay waste, as between an heir and a devisee, while they are litigating their adverse rights in a court of law? See *Jones v. Jones*, 3 Mer. 173.

*Saturday, November 10th.*

**PRACTICE—ATTACHMENT AGAINST TENANT FOR  
NOT PAYING RENT TO RECEIVER.**

**ARMSTRONG v. SOUTHWELL.**

It is necessary to apply to the court for an attachment against a tenant for non-payment of rent, where such tenant has not been served with the general order for payment of rent to the receiver.

Mr. ATTHILL moved for an attachment against a tenant of the name of Armstrong, for not paying his rent to the receiver.

The affidavit of the receiver states, that at the time of his appointment, the lands now in the possession of Armstrong, were in the occupation of a former tenant, who, with the other tenants on the estate, was served with the general order for the payment of rent to the receiver. It is further stated, that the receiver did not serve Armstrong with that order, conceiving it to be unnecessary to do so; Armstrong paid rent to the receiver for some time, but had since fallen into arrear.

The affidavit also stated a personal demand of the rent due.

In consequence of Armstrong not having been served with the order to pay his rent to the receiver, the officer refuses to issue a conditional order for an attachment, and it therefore becomes necessary to make this application to the court.

*Per Curiam.*—Take a conditional order for an attachment.\*

\* NOTE.—The 187th rule of the Equity side of the court directs, that no conditional order for an attachment against a tenant for not paying rent to a receiver, shall issue as of course, in the office, without an affidavit of service of the general order for payment of rent on such tenant. See this rule, *Lowry's Eq. Excheq. Rules*, p. 145.

## CHANCERY.

*Thursday, November 15, 1838.*TRUSTEE—WILFUL DEFAULT—NON-ANTICIPATION  
CLAUSE—HUSBAND AND WIFE—MORTGAGEE IN  
POSSESSION—PRACTICE—EXCEPTIONS TO REPORT.

## BOOTH v. PURSER.

This cause came on for further directions, on the report of Master Gould, and several exceptions taken thereto by the plaintiff, and also by Henry Booth, who, by consent, appeared as a third party by his counsel, on the investigation in the Master's office.

*For the points which arose in this case, see the decisions on the several exceptions.*

The plaintiff in the cause was Amelia Booth\* (wife of the said Henry Booth, who was out of the jurisdiction); and the defendants were John Purser, sen., and John Purser, jun., executors of John Purser, deceased.

The object of the suit was to remove John Purser, sen., and John Purser, jun., from the trusts of the plaintiff's marriage settlement, and to have the trusts thereof carried into execution; and also to have the assets of John Purser, deceased, applied to make good certain breaches of trust, alleged to have been committed by him as trustee of that settlement.

*Original bill, 1832.*

The settlement bore date 28th October, 1811, and was made between Thomas Booth, of the first part; his son, Henry Booth (above mentioned), of the second part; Luke Heron, and the plaintiff Amelia, of the third part; and William Hartigan and John Purser, (whose assets were now sought to be affected), of the fourth part. By that deed, Thomas Booth conveyed certain premises in Kevin's-port, William-street, Naasan-street, and Grafton-street, to the said William Hartigan and John Purser, on trust, after payment of the head-rents, for the separate use of the plaintiff Amelia, *without power of anticipation*. And by the same deed, Luke Heron conveyed certain premises in Fishamble-street (amongst others) to the same trustees, in trust for himself for life; and then, after payment of the head rents, for the plaintiff Amelia, for her separate use, with a power as to Luke Heron's property only, to dispose of it by deed or will.

This deed also contained a proviso, that the trustees were not to be chargeable for any more monies than they should receive, nor for any loss, except by wilful default.

It appeared that the plaintiff was little more than thirteen years of age at the time of the marriage.

Differences occurred between the plaintiff Amelia and her husband, Henry Booth; and on the 16th April, 1821, a deed of separation was

\* As to suit by married woman, suing for her separate estate, see *Sweeny v. Hall*, ante, p. 22.

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made between the plaintiff and her husband. No other persons were parties to this instrument, by which the plaintiff Amelia purported to convey to her husband the premises in Grafton-street, in Nassau-street, and in William street, to hold so long as they should continue to live separate; and Henry Booth, on his part, by the same instrument, agreed that he would not interfere with the premises in Fishamble-street.

From that date, the plaintiff and her husband had lived apart.

*Decretal Order, 18 June, 1836.*

On the 18th June, 1836, a decretal order was pronounced, by which it was decreed that the defendants should be removed from the trusts; and it was referred to the Master to appoint new trustees; and it was also, among other things, referred to the Master to report the rights of the plaintiff under the settlement of October, 1811, and who had been in receipt of the rents of the several premises comprised in that deed, since the date of the separation deed of 16th April, 1821; and it was also referred to the Master to inquire, whether the interest in Nassau-street, (part of the premises in the deed of 1811,) had been evicted; and if so, under what circumstances, and by whose default, and whether, at the time of the eviction, there were any trust funds applicable to the discharge of the rent due thereout. And the Master was directed to charge the defendants with the receipts of their testator, the said John Purser, deceased.

*Master's Report, 22 Oct. 1838.*

The Master made his report accordingly, dated the 22d October, 1838, and thereby stated the provisions of the above settlement of October, 1811, the subsequent disagreement of the parties, the separation deed of 16th April, 1821; and, as to the premises in Nassau-street, reported that they had been evicted, but that he was unable to state by whose default; and the Master reported several other matters, which will appear in the argument of the exceptions.

*Plaintiff's 1st exception overruled.*

Exception to report should not be prolix or argumentative, but state concisely the fault it imputes to the report.

*Plaintiff's 2d exception*

The first exception of the plaintiff was overruled. The Lord Chancellor objected to it as prolix, and as not stating with precision what fault it imputed to the report. His Lordship observed, that, thirty years ago, it was common to draw up long arguments in the shape of exceptions, but that was an improper practice. The exception might have been in a few words: that the Master had reported that the premises in Nassau-street were not lost by default of any one, whereas he ought to have reported that they were lost by default of John Purser. That would have been quite sufficient.

The second exception raised a point, as to whether the defendants, being executors of the deceased trustee, and not having themselves acted in the trusts, were liable, under the circumstances, for a loss occasioned by their refusal, either to sign receipts to certain tenants, or sign a consent for the appointment of a receiver; in consequence of which, it happened that certain rents were lost. In the argument on this exception, a question of practice also arose, as to the proper mode of proceeding,

where wilful default appears in the investigation in the Master's office, not having been referred to the Master by the decretal order.

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Mr. *Blackburne*, Q. C., and Mr. *Warren*, Q. C., against the exception, contended that the executors were not bound to act in the trusts, or to sign a consent which would have fixed them with the responsibility of having acted.

Mr. *Lefroy*, Q. C., and Mr. *W. Brooke*, Q. C., contra.—The testator of these defendants acted in the trusts, and actually, on one occasion, made a lease of part of the trust premises in his own name, reserving the rent to himself; then his executors are called on to sign receipts, and they refuse.

LORD CHANCELLOR.—How can you except to the report of the Master, for omitting to state what you contend was wilful default by these executors? The decretal order does not refer the question of their wilful default.

Mr. *Brooke*.—On further directions, we have a right to have a decree that these rents were lost by the defendants' own default, although not so charged originally. In *Law v. Hunter* (a), Lord Gifford, M. R., says, "If you wish for a reference as to wilful default at the first hearing, you must state a case of wilful default on pleadings and proofs; but the more ordinary course is not to give such inquiries at the first hearing; but if, on the return of the Master's report, the court sees ground to charge the defendant with wilful default, it will give a decree to that effect on further directions." The court, in a suit against executors, never gives a reference as to wilful default at the first hearing, unless the plaintiff make application for it. The court does not presume misconduct in executors.

LORD CHANCELLOR.—It appears to me the course you contend for is a very inconvenient one.

Mr. *Warren*, for defendants.—In *Law v. Hunter*, cited by Mr. *Brooke*, no case was charged by the bill of wilful default. Here it is charged in the bill. Besides, that was a question as to directing balances and rests.

Mr. *Brooke*, in continuation.—In *Salt v. Donegal*, your Lordship made a similar order.

(a) 1 Russ. 100.

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Mr. *Esfrey*, on the same side.—In *Travers v. Townsend* (b), before Sir Anthony Harte, the bill did not charge wilful default, but a general account was directed. On the return of the report, several instances of default appeared; Sir Anthony Harte said, “If the case be not made at first, and no direction originally given, but it appears, on the facts stated in the report, that there has been negligence, the court will apply itself to that on further directions.” We except, because the Master did not put into the report the facts which would have entitled us now to a further reference as to wilful default.

Where wilful default is not referred by decretal order, but appears on the investigation in the Master's office, it seems no exception can be taken to report for not finding wilful default.

The trustee acted his executors not bound to act.

LORD CHANCELLOR.—Sir Anthony Harte says, in that case, “Where there is no direction in the decree that the executor is to be charged for default an exception on that ground is improper.” I think that case is against you, if I understand it. I must overrule this exception, because it amounts to this, that the Master has not reported wilful default. Now, that question was not referred to him, and I therefore overrule the exception; but I do not say that I preclude myself, in the decree I shall make, from founding a direction upon these facts. At present, I shall merely say, that as to actual default made by the testator, I must charge the executors; but as to matters occurring since the death of the testator, I cannot, because it does not appear that the executors were obliged to act in the trusts.

Plaintiff's 3d exception.

That William-street premises let by trustee, and fine taken.

The third exception of the plaintiff related to the premises in William-street, of which a lease had been made by John Purser, deceased, to one Patrick Dowd in November, 1814, and a fine of £140 paid to Thomas Booth, and the rent was reserved to the said John Purser, his heirs and assigns. The exception was taken, because the Master had not stated these facts in his report.

Defendants' argument against the 3d exception.

That plaintiff originally joined in lease and has acquiesced for 21 years.

Mr. *Blackburne*, against the exception.—The plaintiff, Amelia Booth, was a party to this lease. There are two questions here—first, whether, under the provisions of the marriage settlement, she had not power to make this lease and take a fine—secondly, whether she can be permitted now to complain of an act to which she consented at the time. During 21 years, there has been no complaint about the matter, and now Purser is dead. So far as the plaintiff's property is concerned, the court deals with her as if she were a *feme sole*. If she concur in the breach of trust, she cannot be permitted to complain. In *Walker v. Symonds* (c), the Lord Chancellor says, “If the *cestui que trust* joins with the trustee in “a breach of trust, knowing the circumstances, he cannot complain.”—[LORD CHANCELLOR. That is with respect to trustee and *cestui que*

(b) 1 Mol. 496.

(c), 3 Swanst. 64.

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trust generally ; but this is the case of a married woman.]—At this distance of time, the plaintiff must be taken to have acquiesced, for good reasons, which it would be hard to call on these executors to unravel ; when Purser, who might have explained it, is dead.

Mr. *Lefroy*, for the exceptions.—There is a non-anticipation clause in the settlement, and no leasing power. As to the long acquiescence of the plaintiff in the breach of trust—to take advantage of her acquiescence, you must shew that she knew of the breach of trust being committed. Unless she knew, she could not object. She was then only sixteen years of age ; besides, there is actual concealment here. There are two parts of the lease. On the tenant's part, there is an indorsement of the receipt of the fine ; on our part there is no such indorsement ; I admit that there is a recital, that it was in consideration of £140, but there was no indorsement. The other part, which has the indorsement, was only handed over to us within these twelve months. The money was received by *Thomas Booth*, as appears by his receipt, indorsed as I have mentioned. *Thomas Booth* had no estate or color of a title whatever to receive the money. This was a clear breach of trust in the trustee. Where there has been a palpable breach of trust, and the trustee says, "My *cestui que trust* acquiesced," the *onus* is on him to shew both acquiescence, and that such acquiescence was with full knowledge of the circumstances. The case of *Walker v. Symonds* (d) establishes that most clearly. The court decided there, on the mere want of evidence that the *cestui que trust* was fully apprised of the circumstances. There is an infant child here, a party in the cause, entitled in remainder, to the property that was thus dealt with. The Master has reported that the plaintiff was not in receipt of the rents at the time ; therefore, the presumption is, she could not have known of it.

Plaintiff's,  
argument for  
3d exception.

That acquiescence of plaintiff was without full knowledge of circumstances, and will not excuse trustee.

Mr. *Warren*, against the exceptions.—The plaintiff, after the execution of that lease, dealt with the property in 1821, when she executed the separation deed, which she did behind the back of Purser. He remained in complete ignorance of the deed of 1821, until his death. Her extreme youth is relied on ; she was twenty-three when she executed the deed of 1821.

LORD CHANCELLOR.—I think the plaintiff has laid a ground for inquiry into the circumstances under which the lease of November,

Trustee of separate property of *feme covert*, without power of a third person—

anticipation joining in a lease for which a fine was paid and received by a third person—*Held*, a breach of trust, though *feme covert* herself joined in the lease.

(d) 3 Swans. 73, and note in p. 80.



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1814 was executed. As to the plaintiff's acquiescence, it does not appear that there is any evidence of that, beyond the mere signing of the lease. The transaction of 1821 was an additional fraud committed by the husband, but does not exonerate the parties to the transaction of 1814. I shall direct an account of the fines received by John Purser, deceased, or which without wilful default, he might have received.\*

*Plaintiff's 4th  
exception.*

The plaintiff's fourth exception was abandoned.

The fifth exception objected to the Master's report, for finding that the trustee had no funds in his hands applicable to pay the rent and costs due on foot of the premises in Nassau-street, so as to prevent their eviction; and contended that, under the trusts of the settlement of 1811, the profit rents of all the trust premises must be considered as funds in his hands applicable to that purpose. The matter of this exception, and that of the following one, were argued together.

*Plaintiff's  
5th and 6th  
exceptions.  
That trustee  
was guilty  
of wilful de-  
fault in per-  
mitting pre-  
mises in Nas-  
sau-street, to  
be evicted for  
non-payment  
of head-rent.*

The sixth exception was as follows:—"For that the said Master has "by his said report found that it was not on account of John Purser, deceased, that the eviction of the premises in Nassau-st. took place; "whereas, the said Master should have found that the said eviction did "take place through the default of the said John Purser, deceased."

The LORD CHANCELLOR at first thought the exception was wrong, on the same ground as before adverted to, viz:—That the question of wilful default had not been referred to the Master; but Mr. *Malay* for the plaintiff, pointed out, that with regard to these particular premises in Nassau street, there was a reference as to wilful default in the decretal order. His Lordship then desired the counsel for the plaintiff to go into the exception.

*Plaintiff's  
argument for  
5th and 6th  
exceptions.  
That first  
trust of settle-  
ment was to  
pay head-rent,  
and therefore,  
trustee bound  
to see them  
paid.*

Mr. *Lefroy*, Q.C., for the 5th & 6th exceptions.—The plaintiff's interest in the premises in Nassau-st. were evicted in 1830, by the head-landlord for non-payment of rent. This, we contend, happened by the default of the trustee. The first trust in the settlement was to pay the head-rent, and then the residue of the rents to plaintiff's separate use. The trustee did neither one nor the other. The husband got possession of these premises on the separation in 1821, and in 1830 they were evicted for non-payment of the head-rent. The trustee is answerable to the plaintiff for that loss. In the case *Montford v. Lord Cadogan (e)*, there was a settlement of a church lease, renewable by custom every fourteen years, the trust was to pay the rent, and then such fines as were occasioned by omitting to renew regularly, and subject thereto to Lord Montford for life; they allowed several periods to elapse, and suffered Lord Montford to remain in receipt of the rents. The trustees

\* See the decree, post.  
(c) 17 Ver. 438.

in that case were held clearly bound to renew, the means being given them to do so, although not in terms actually directed by the settlement to renew. That case was affirmed on appeal (*f*). In *Caffrey v. Darby* (*g*), a married woman was interested in the fund, and joined her husband in inducing the trustees to do as they had done. The property was lost, and the trustees were afterwards obliged to make good the deficiency, not having enforced the payment of certain instalments.

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Mr. Warren, Q. C., against the exceptions.—The deed of 1821, by which this lady was displaced of the rents of Nassau-street, and her husband permitted to go into possession, was the occasion of this loss. The separation deed of 1821 was her own act, and was suppressed from the knowledge of the trustee. And the original bill in this cause suppressed that deed. We stated it in our answer, and then the plaintiff amended her bill. By that deed she purported to covenant, not to interfere with her husband receiving the rents of Nassau-street, and other properties, and his receipt alone to be a sufficient acquittance to the tenants. Here is a direct interference by the *cestui que trust* herself, with full knowledge of her husband. Till 1830 there was no communication from her, that she was displaced of these rents; then in Easter 1830, an ejectment was brought, and by the affidavit of service it appears, that the ejectment was served on a maid-servant of Mr. Purser, the trustee. That was the only service; and on the 14th June, immediately after, he went to England, and died there on the 4th of August in the same year. The Master finds that his executors, the present defendants, had no notice of the transaction at all. When the eviction took place, this lady ought to have applied to the trustee, to redeem the premises. Judgment was in Trinity Term. The *habere* was executed in December, 1830. She made no application to the defendants. They were left in perfect ignorance. And the Master finds, that at the time, Purser had no funds in his hands out of which he could have paid the head rent. In fact, giving him credit for the costs in the cause of *Martin v. Booth*, which he was entitled to under an order of this court, there was actually a sum of £4. 2s. 9d. due to him.

Defendants' argument against 5th and 6th exceptions.

That the trustee had no funds in his hands to pay head-rents, and was left in ignorance that premises were in danger of eviction.

Mr. Brooke, Q. C., for the exception.—It is said the trustee had no funds. We contend it was his duty to have funds. He is answerable in this court, if the settlement provided him with the means of having funds in his hands for the preservation of the property, and he neglected to use those means. *Caffrey v. Darby* (*h*). *Montford v. Cadogan* (*i*). As to the trustee being in ignorance that the plaintiff was displaced,

Plaintiff's reply, as to 5th and 6th exceptions.

That it was trustee's duty to have funds in his hands, and apply them to head-rents.

(*f*) 19 Ves. 636.

(*h*) 6 Ves. 489.

(*g*) 6 Ves. 489.

(*i*) 17 Ves. 488.

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the letter dated 27th March, 1830, from Thomas Booth to John Purser the trustee, is as follows :—" Dear Sir, I have ejected Mr. Lock of " Nassau-street, one of the tenants on the estate of which you are " trustee. Counsel are of opinion you should sign the lease \* \* \* " The tenant will not take it unless this is done, and the property would " be lost."

As to the deed of 1821, it contains a recital of the settlement which is false. The settlement is recited in such a manner, that any one reading the deed would suppose the plaintiff had a disposing power by deed or will, over the whole property. The non-anticipation clause is omitted. Thus, she was brought to suppose that she could enter into that deed, by which she purported to convey nearly the whole to her husband. Her grand-father had died in 1814; her father and mother were both dead, and she was without protector. It is said the trustee was ignorant of that deed. Is that consistent with Thomas Booth's letter to him in March, 1830?

Whether the trustee of lease holds settled to separate use of married woman is bound to see that head rents are paid, or liable as for wilful default, if the premises are evicted for nonpayment of rent?—*Quere.*

LORD CHANCELLOR.—I think this is not an effectual deed of separation. The husband and wife are the only parties to it. There is no trustee for her protection. The covenant to live apart could not be binding on the husband, and is not binding on the wife. That deed therefore does not affect her rights to the premises in Nassau-street, or the other property which she thereby purported to convey. As to the loss of the premises in Nassau-street, I shall direct a further inquiry in the office.\*

Henry Booth's 1st and 2d exceptions.

That the settlement not well proved.

After decretal order, third party coming into Master's office, by consent, *pro interesse suo*, and then requiring strict proof of a deed previously admitted, may it seem, have an inquiry, and put the parties on strict proof but at the peril of costs if deed be finally proved as admitted.

The first and second exceptions of Henry Booth (the husband of plaintiff,) denied that the legal evidence had been given of the marriage settlement of 1811, and denied that it contained a non-anticipation clause. Henry Booth had not been originally a party in the cause, but since the decretal order was pronounced, had got leave by consent, to appear in the Master's office, as a third person. The settlement had been proved at the original hearing, by a copy which the defendants had admitted: and the question now was, whether Henry Booth having come in as a third person in a late stage in the cause, could now object to that evidence, and throw the parties on strict proof of that deed. The Lord Chancellor said, that if Henry Booth's counsel required it, he would give a reference as to the contents of that deed, but it would be

\* See the decree *post*, which directs an inquiry, whether trustee might without wilful neglect or default, have received sufficient out of the premises in Nassau-street, to have discharged

the head-rent. By the notes of the hearing it appears, that the 5th and 6th exceptions stand over. But this direction in the decree seems to have decided the principle.

at the peril of costs, in case the copy proved correct. Mr. *Blake Q.C.* and Mr. *Monahan* for Henry Booth, on this intimation, declined to take the reference. The first and second exceptions of Henry Booth were accordingly withdrawn.

Henry Booth's third and fourth exceptions related to the premises in Grafton-street. He insisted, by those exceptions, that his wife's right to those premises was barred by the statute of limitation. The facts he relied on were these. At the date of the marriage settlement of 1811, the premises in Grafton-street (as therein mentioned,) had been mortgaged, and Thomas Booth, (father of Henry,) therefore, conveyed only an equity of redemption to the trustees of the settlement. After Thomas Booth had thus parted with his whole estate in the premises, he obtained an assignment of the outstanding mortgage, about the year 1817. And the mortgagee's interest was accordingly conveyed to one Joseph Hardy, who it was admitted, was a trustee for the said Thomas Booth, who in 1817, brought an ejectment in the name of Joseph Hardy, as mortgagee, and obtained possession under an *habere*, in September, 1817. Thomas Booth subsequently renewed the lease twice, with the head-landlord, in his own name, and continued in possession until his death. After his death, his widow entered and continued in possession until her death in May, 1835, and since then, till the present time, Henry Booth had been in possession, as heir of his father, the said Thomas. Thus, it was contended, he had a good title, as mortgagee in possession since September, 1817, being twenty years and upwards.

On the part of Henry Booth, it was accordingly contended, that he was entitled to retain the premises in Grafton-street, on two grounds:—First, as having been conveyed to him by his wife, the plaintiff, under the deed of separation in 1821. Secondly, (if the court refused to support that deed,) that he had a good title under the statute of limitations (*k*), by twenty years' possession.

Messrs. *Blake Q.C.* and *Monahan*, for Henry Booth, on the first point. Two objections are made to the deed of 1821. First, that there is a fraudulent recital, and secondly, that there is no consideration to support it. As to the erroneous recital, the plaintiff was as much a party to the error as Henry Booth. It is as likely that *he* was deceived as that *she* was deceived. Then, as to the consideration. We contend, that the giving up marital rights may be a good consideration. *More v. Ellis Freeman* (*l*). There is this distinction—Where there is an agreement to separate, which is *prospective*, the court will not execute it, yet where the separation is actually made, then an agreement to give up

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*H. Booth's  
3d and 4th  
exceptions.*

*That his  
title to Grafton-street  
premises,  
ought to have  
been reported  
good against  
his wife's  
separate  
estate.*

*Argument  
for Henry  
Booth's 3d  
and 4th ex-  
ceptions.*

*1. That se-  
paration deed  
was valid.*

(*k*) 3 & 4 W. 4, c. 27.

(*l*) Reported in 1 Bro. P. C. 237. T. m. Ed., under the name of *Freeman v. More*, also in *Bunbury* 203, as *More v. Ellis Freeman*.

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marital rights is a good consideration. There is another good consideration for the deed. He covenants that her *subsequently acquired* property shall be free from his control. That is a good consideration on the authority of the same case, *More v. Ellis Freeman*. In that case there was an issue directed, whether the wife was coerced to make the arrangement; it was found not: and the transaction was confirmed. And in a late case it has been held, that a covenant not to interfere is a good covenant. *Logan v. Birket (m)*. As to the clause against anticipation, it will not avail the plaintiff. It is admitted that she had a power to dispose by deed or will of the Fishamble-street property. By the deed of 1821, she disposed of the Grafton-street premises instead, and kept Fishamble-street. It was competent to her to make that arrangement.

2. Statute  
of limitation,  
3d & 4th W. 4  
c. 27.

As to the 2d point.—We are a mortgagee for twenty years in possession, and the statute of limitations is express against the plaintiff. It is said the bill was filed in 1833, but we were not made a party, nor are we yet a party. The consent that we should file a charge in the office was not till May, 1838.

Argument  
against  
3d and 4th  
exceptions.

Mr. *Lefroy*, against Henry Booth's exceptions.—First, as to the deed of 1821, it is worse than a nullity; it was a fraud by the husband on his wife. There are no trustees in it for her protection, and no consideration to support the conveyance which she thereby purported to make, of her separate estate in the premises in Nassau-street, William-street, and Grafton-street. The consideration stated is, that he should not interfere with Fishamble-street, which was also her separate estate; so that she gave up part of what was her own, and got nothing in return. The absence of consideration is manifest. Then as to the second point; Henry Booth's title as mortgagee in possession.—It was not competent to Thomas Booth, after conveying the equity of redemption to the uses of the settlement of 1811, to annihilate that settlement by getting possession of the outstanding mortgage. He entered into possession, but still clothed with the obligations of a party to the deed of 1811. He obtained renewals of the lease, but they must be considered as held in trust for the plaintiff. He cannot be permitted in equity to defeat a title which he himself gave.

Mr. *T. B. Smith*, Q. C. for the minor, on the same side, cites *Corbett v. Barker (n)*, and *Pim v. Goodman (o)*.

Mr. *Goold*, on the same side, cites *Nesbitt v. Tredennick (p)*.

(m) 1 Myl. & K. 221.

(n) 3 Anst. 755.

(o) 2 Mer.

(p) 1 Ball. & B. 47.

LORD CHANCELLOR.—I shall refer it to the Master to report what rents were received, or might without wilful default have been received by the trustee. As to the husband's claim as mortgagee in possession of the premises in Grafton-street, I will consider the matter, but at present, I am disposed to think, that Thomas Booth could not, by clothing himself with any other title, defeat the settlement of 1811. I think I must consider Henry Booth as a trustee for the parties entitled to the equity of redemption in these premises. If it was a gaining transaction they might seek the benefit of it.

son's wife; afterwards purchases the outstanding mortgage, brings an ejectment; and goes into possession as mortgagee; son having separated from wife, enters after death of his father as his heir at law, and 20 years elapse, *Held*, he cannot set up statute of limitations against his wife's separate estate.

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Father on marriage of son, conveys an equity of redemption on trust for separate use of

*Reg. Lib.*

Declare that John Purser, deceased, was bound by the trust of the settlement of 28th October, 1811, from time to time, by and out of the rents and income of the several premises therein mentioned, to pay and discharge such ground and other rents as the said premises were respectively subject to\*; and accordingly refer it back to the Master, to take an account of the rents, issues and profits of all the said premises, received by John Purser, deceased, or which without his wilful neglect or default he might have received, including any sum or sums paid for fines, on execution of any lease or leases, and especially let the Master inquire and report, whether the said John Purser, deceased,

See the plaintiff's 5th and 6th exceptions: ante p. 38 and 40.

See the plaintiff's 3rd exception: ante p. 36 to 38.

\* As to the settlement of 28th October, 1811, see *ante*. The words of the trust as to the property conveyed by Thomas Booth, (which included the premises in Nassau-st., William-st., and Grafton-st.,) were as follows: "Upon trust, that they the said trustees and the survivor of them, his heirs, executors, administrators, and assigns, do, and shall from time to time, by, and out of the rents and income of the said premises respectively, discharge and pay such ground and other rents, as the said premises are subject to, under and by virtue of the respective indentures of demise of the same, and do and shall from time to time, and during the joint lives of said Henry Booth, and Amelia Harburton, retain, and take all the residue

"and surplus of the rents and income of the said messuages, houses, and tenements, and stand and be possessed thereof, upon trust, to the sole use of the said wife, separate and apart from and exclusive of her husband, not to be subject to his contracts or engagements, and the receipts of the said Amelia, or any person or persons to whom she may give or appoint the same, to be a good discharge for the money which shall be thereby expressed to have been received; yet nevertheless, so that the said Amelia Harburton may not anticipate, charge, or assign all or any part of the same rents and income before the same shall become due and payable." The trusts, as to the property conveyed by Luke Heron, were declared by a separate part of the

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See the  
plaintiff's 2d  
exception :  
ante p. 34 to  
38.

See Henry  
Booth's 3d  
and 4th ex-  
ceptions ; p.  
41 to 43.

might without wilful neglect or default have received sufficient out of the premises in Nassau-street, to have discharged the head-rent, or ground-rents thereof, for the non-payment of which the said premises were evicted ; and if so, let the Master ascertain and report the value of the said interest lost by said eviction.

And let the Master inquire and report, who, in point of fact, received the rents, issues and profits, of all said several premises, and let the Master inquire and report, whether any rents have been lost by any act or default of the defendants, John Purser sen., or John Purser jun., since the death of John Purser deceased.

And declare the plaintiff entitled to an estate for life, to her sole and separate use, as limited by said settlement of the 28th October, 1811, of and in the several premises therein mentioned, save only those in Kevin's-port, the plaintiff's interest in which expired on the death of Thomas Booth the elder, subject as to the premises in Grafton-street, to whatever sum, if any, as may appear to be due on foot of the mortgage which affected the same, provided the defendant Henry Booth shall desire to have said account taken as hereinafter mentioned, and subject thereto, declare renewals in said Master's report mentioned, to have been obtained by Thomas Booth, on trust for the plaintiff, and the other persons entitled to the equity of redemption of said premises, under and by virtue of said settlement, and in default of said Henry Booth desiring to have said account taken, as hereafter mentioned, declare plaintiff entitled to the possession of said premises. But if the said Henry Booth shall desire to have an account taken, of the sum due on foot of said mortgage, and shall signify the same within one month in the Master's office, then let the Master proceed to take such account, the said Henry Booth taking upon himself, to bring into the Master's office a personal representative to

instrument, but were similar in all respects to the above, as regarded the payment of the head-rents, the separate use of the plaintiff in the profit-rents, and the provision against anticipation. But subsequent to this latter clause came this proviso—"Provided also, and it is hereby agreed, that it shall and may be lawful for the said Amelia, to make such disposition of the property hereby granted, released

"and assigned by the said Luke Heron, by deed or will, as she shall think fit or proper, anything herein contained to the contrary notwithstanding."—See ante p. 33 p. 40. The separation deed of the 16th April 1821, recited the settlement, omitting the non-anticipation clauses, and reciting the above proviso, as if it applied to the whole of the settled property. See Mr. Brooke's argument, *supra* p. 40.

said Thomas Booth, and Jane Booth deceased, or else agreeing to waive the necessity of such personal representative, and charging himself with the rents of said premises in such manner as said representative would be chargeable therewith, and in taking such account, let the Master set off said rents, first to pay the interest, and next to discharge the principal of said mortgage debt, and the costs, expenses, and renewal fines, of obtaining such renewals, and all such sums as said Thomas Booth, and those deriving under him, may have necessarily, and for the benefit of the parties interested in said premises in Grafton-st., and the improvement and preservation thereof, laid out and expended thereon, and for the taxes payable thereout; and in taking said account, let the Master be at liberty to allow all such other just and fair credits and allowances, and to examine witnesses in relation to said accounts, as he shall think fit.

And let the Master ascertain the sum which may remain due on foot of said mortgage, or the balance of rents, if any, which may appear to be due on such account to plaintiff; and if the Master shall find that the said Thomas Booth occupied the said premises or any part thereof, since said 10th September, 1817, let the Master set a value, by way of annual rent, on the premises so occupied during the occupation thereof, and charge the same in such account as hereby directed.

The decree then directs a reference as to the rights of the minor Matilda Booth, and the appointment of a guardian *ad litem*, and concludes thus:—

And let the receiver be extended to the premises in William-street, and plaintiff to be at liberty to apply to have the receiver extended to the premises in Grafton-street, in case any unnecessary delay shall occur on the part of said Henry Booth, in taking the account hereinbefore directed: and let the Master be at liberty to state any special circumstances in relation to any of the matters hereby referred to him.

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PURSER.



*Wednesday, November 21st, 1838.*

**PRIORITY OF DEEDS—REGISTRY ACT—NOTICE TO  
AGENT—HUSBAND & WIFE—SEPARATION DEED.**

**NIXON v. HAMILTON.**

Though a mortgage was registered, yet the mortgagee having employed the solicitor of mortgagor was presumed to have had notice of a prior unregistered instrument, of which the solicitor had clear continuing notice, under fraudulent circumstances at the time of the mortgage.

The rule, that notice to an agent, in order to affect the principal, must be notice received in the same transaction is not inflexible. The circumstances must be taken into consideration.

*Voluntary deed of 1815*

*Deed of separate maintenance, 26th September, 1821, (not registered).*

The original bill was filed 31st May, 1827, by John Bachelor, against Frederick Hamilton, Charles Fitzgerald, and Thomas Osborne, to raise a mortgage, dated 3d June, 1825, executed by Hamilton to Bachelor, and to pay off a prior incumbrance, to which Fitzgerald was entitled.

The bill was amended 1st March, 1828, and thereby William Bernard, H. S. Browning, and Mary Hamilton (wife to the above Frederick Hamilton), were made parties.

Bachelor died, and on 7th April, 1829, his executors, Rev. Alexander Nixon and Alexander Boyle, revived the suit, and added parties.

On the 16th of August, 1832, the plaintiffs, Nixon and Boyle, amended their bill, adding parties, praying the same relief as by the original bill, and praying an account of incumbrances prior to the mortgage of 3d June, 1825, and a sale.

On 30th June, 1836, there was a decree to account, and thereby a question was reserved, as to the priority of the plaintiff's mortgage, dated 3d June, 1835, over a certain deed of separate maintenance, dated 26th September, 1821, under which Mrs. Hamilton, wife of the said Frederick Hamilton, claimed an annuity of £600 a-year.

The Master made his report, dated 18th May, 1836. The cause now came on for further directions on report and merits, and the reserved question, as to the priority of the deeds of 1821 and 1825 was debated.

The facts bearing on the reserved question were as follows :—

In 1815, a deed (admitted to be voluntary,) was executed by Frederick Hamilton to his wife, whereby he granted her an annuity of £100 a-year, and conveyed the bog of Clunah to secure the payment thereof. This annuity fell into arrear.

The deed dated the 26th September, 1821, which was the deed now in question, was made between Frederick Hamilton, of the first part; his said wife, Mary Hamilton, of the second part, and two trustees, H. S. Browning and William Bernard, of the third part. By this deed, (after reciting that unhappy differences had arisen between the said F. Hamilton, and Mary, his wife, which were likely to continue, and that they had agreed to live separate, and that the said F. Hamilton had agreed to grant his said wife an annuity of £600 a-year for her maintenance, and for the maintenance of their five children), the said Frederick Hamilton, in consideration of 10s., covenanted with the said trustees, Browning and Bernard, to pay an annuity of £600 a-year to the said trustees,

in trust for his said wife, during the joint lives of himself, the said Frederick, and his said wife; the said annuity to be chargeable on the lands of Clunagh, Ballinamallagh, and Killshanroe, with power of distress and entry; and by the said deed, the said Frederick, for the considerations aforesaid, and the better to secure the said annuity, demised the said three denominations of land to the said trustees for 99 years; and it was thereby agreed, *between all the parties*, that if the said Frederick should ever be sued for any further provision or monies for the maintenance or alimony of his said wife, or any of their said children, or for any debts incurred by his said wife during the separation, or in case the said children should not be suitably maintained, then that the said Frederick might deduct such monies out of the annuity, and remove the children, and in the latter case might retain £60 a-year thereout for each child so removed, and *in consideration of the premises*, the trustees thereby covenanted that the said Mary should not sue or molest her said husband, or sue him for restitution of conjugal rights, or for alimony, or for any farther sum whatsoever. And it was thereby *further agreed by the said trustees*, their heirs, executors, and administrators, with the said Frederick Hamilton, his executors and administrators, that the said Mary *should well and truly provide for, support, and educate the said five children, until the age of 21, or marriage*, and that upon the death, marriage, attaining 21, or removal of any of the said children, £60 a-year for such child should be deducted out of the said annuity.

The above covenant by the trustees, that Mrs. Hamilton should support the children, was particularly relied on in the argument, as an independent covenant, and a sufficient consideration to support the deed.

Besides the considerations mentioned in the above deed, it was proved in the cause, that at the time of the making of the deed, Frederick Hamilton was raising money by the sale of part of his estates, and that the purchasers required his wife to join in the conveyances, which under the advice of her solicitor, Mr. Burrowes, she declined to do, until the above deed of Sept., 1821, should be executed by Frederick Hamilton. A written memorandum dated the same day as the deed of September, 1821, was proved in the cause, signed "H. S. Browning," by which it appeared, that the deeds of conveyance to the purchasers were deposited with him after being executed by Mrs. Hamilton, to be held by him until the deed of September, 1821, should be executed and delivered by Frederick Hamilton.

It also appeared that it was part of the same arrangement, that the arrears due on foot of the voluntary deed, dated in 1815, should be surrendered by Mrs. Hamilton, and that the said deed of 1815, should be given up to be cancelled, in consideration of the execution of the deed of September, 1821. It was however denied, that any effectual surrender of these arrears had been made.

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*Covenant by trustees, that wife shall support the five children.*

*Considerations for deed of September, 1821, not mentioned therein.*

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No allusion appeared in the deed of September, 1821, to any part of the above arrangements.

William Bernard, one of the trustees named in the above deed, was also the solicitor who prepared it, and was land agent and law agent to Frederick Hamilton.

Shortly after the above deed of 1821 was executed, Mr. Burrowes, the solicitor of Mrs. Hamilton, took it to the Registry office to have it registered. The officers were busy and he left the deed and the engrossment of the memorial in a press, in that office. When he returned, he found that the deed and memorial had been purloined or removed, and thus the registry of the deed was prevented.

*Lis pendens.*

Wm. Bernard's name was on the back of the lost instrument, he having prepared it. He was suspected of having got possession of it, and on 23d January, 1824, Mrs. Hamilton filed a bill in this court, making her husband and the said Wm. Bernard, and others, parties defendants, and charging that Bernard had got possession of the deed. Bernard was served with process, but never answered the bill, though he put in an answer for another defendant named Wilton, as his solicitor.

*Mortgage  
of 3d June,  
1825; (regis-  
tered).*

On the 3d June, 1825, pending the above suit, the mortgage (for which priority was now claimed over the deed of 1821,) was executed by Frederick Hamilton, to Bachelor, and the three denominations of land, comprised in the deed of 1821, were also included in the mortgage.

*Bernard  
acted both for  
mortgagor  
and mortgagee  
and had notice*

The same Wm. Bernard who had prepared the deed of 1821, and was a trustee therein, also prepared this deed of mortgage, and was employed in the mortgage transaction by Bachelor the mortgagee, as his agent therein, though still the land-agent and law-agent of the said Frederick Hamilton, the mortgagor.

This mortgage was duly registered.

*Mrs. Ha-  
milton in re-  
ceipt of rents  
under unre-  
gistered deed.*

At the time of the execution of the mortgage, Mrs. Hamilton, under the deed of 1821, was in receipt of the rents of the three denominations of land therein comprised, and which were also included in the mortgage.

Wm. Bernard died in 1828, never having answered the bill filed by Mrs. Hamilton in 1824. After his death the deed of 1821 was found amongst his papers, and Mrs. Hamilton recovered possession of it.

The questions now were; *first*, whether the deed of September, 1821, was not a voluntary conveyance, and void for that reason, as against the subsequent mortgage in 1825, for valuable consideration. *Secondly*—supposing the deed of 1821, were not a voluntary instrument, whether it should not be postponed, being an unregistered instrument to the mortgage of 1825, which had been duly registered. *Qr* whether Bachelor, the mortgagee, was to be presumed to have had notice through his agent Bernard, of the deed of 1821, so as to countervail the effect of the registry.

The *Attorney-General*, Mr. *Blackburne*, Q. C., Mr. *Martley*, Q. C., and Mr. *J. Murphy*, for the plaintiffs.

The deed in question purports to be a deed of separation between Mr. Frederick Hamilton and his wife. It recites, in the usual way, that differences had arisen between them. The parties to the deed are Mr. and Mrs. Hamilton, and two trustees. We contend, *first*, that it is a voluntary instrument, and void as against creditors for valuable consideration; and, *secondly*, that even if the court should hold it not to be a voluntary instrument, yet, not having been registered, it must be postponed to our mortgage, which, though of subsequent date, has been duly registered. As to the first question, is it voluntary?—The deed, as it stands, contains, on the face of it, no consideration sufficient to support it against creditors. The parties have, however, endeavoured to prove that there was a consideration not stated in the deed. Mr. Burrowes, one of the witnesses examined in the cause, thought proper, in answer to the concluding general interrogatory,\* whether he knew any thing else material to the rights of the parties, to reply, by deposing to a long statement, which the parties now rely on as proving a consideration for that deed. He states, that in 1815, after the marriage of Mr. and Mrs. Hamilton, an annuity was granted to her by her husband; and though they admit that instrument of 1815 to have been voluntary, yet, they say that arrears on foot of it having been due in 1821, Mrs. Hamilton agreed to give up those arrears, in consideration of a new deed; and that, in pursuance of that agreement, this deed of 1821 was executed.

LORD CHANCELLOR.—That would be a good consideration, according to decided cases. Though an instrument be itself voluntary, yet, if arrears be due on foot of it, another instrument, executed in consideration of releasing those arrears, is not considered a voluntary deed. It is a very odd principle, but, whether right or wrong, it is so decided.

\* Mr. Burrowes was examined in the cause, for the purpose merely of proving some documents, on behalf of Sir F. M'Donnell, who was entitled to a charge on the estates of Frederick Hamilton.—When the concluding general interrogatory, whether he knew any thing else material to the rights of the parties was put to him, he produced a number of documents relating to the rights of Mrs. Hamil-

ton, which he proved, and also gave parol testimony at length on the subject of her claims. A motion was made in the cause on the 23d June, 1826, to suppress this deposition of Mr. Burrowes. The court did not, however, suppress the deposition, but gave liberty to the plaintiffs to cross-examine Mr. Burrowes as to the matters therein deposed to. The plaintiffs did not avail themselves of this order.

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*Attorney-General's statement for the mortgagee.*

*That the deed of 1821 was voluntary.*

A voluntary deed, and arrears due on foot of it, if the arrears are surrendered in consideration of a new deed, such new deed is not voluntary †

† See *Gilham v. Locke*, 9 Ves. 612.

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Argument  
for the mort-  
gagee conti-  
nued.

That notice  
through solic-  
itor must be in  
the same  
transaction.

That con-  
structive no-  
tice by *lis pen-  
dens* is not  
sufficient to  
postpone a re-  
gistered deed.

That con-  
structive no-  
tice by posses-  
sion does not  
apply to a  
mortgagee  
who has regis-  
tered his mort-  
gage.

Argument for  
Mrs. Hamilton

1. That deed  
of 1821 was  
not voluntary.

That there  
were two con-  
siderations not  
stated in deed.

Surrender  
of right to  
dower.

*Attorney-General*, in continuation.—By what form did Mrs. Hamilton extinguish those arrears? The deed says nothing about them—it contains nothing about those arrears. There is nothing in the deed of 1821 to prevent Mrs. Hamilton recovering the arrears alleged to be due on foot of the alleged deed of 1815, and the instrument of 1815 is not produced. Besides, the consideration stated in the deed of 1821 is inconsistent with the money consideration now set up. The consideration stated in the deed is the maintenance of the children after the execution of the deed. We therefore contend that it is a voluntary instrument. However, if the court should be against us on that point, we rely on the registry of our mortgage, and the non-registry of the deed of 1821. They attempt to answer this by the usual allegation, that we had notice of the deed of 1821, and they endeavour to make out notice, by shewing that Mr. William Bernard, the solicitor who prepared one mortgage in 1825, also prepared this deed of 1821. But this will not avail them, for it is settled, that notice to the solicitor, in order to bind his client, must be *notice in the same transaction*. They also endeavour to make out constructive notice, by the circumstance that there was a pending suit in 1825, when our mortgage was executed. But a registered deed is not to be postponed, on the ground of constructive notice, by a *lis pendens*. *Wyatt v. Barwell*(a). They also allege constructive notice, on the ground that Mrs. Hamilton received some gales of rent from the tenants; and they say, that she being then in possession, it is constructive notice to us. But though this might be constructive notice to a purchaser, it is not to a mortgagee. A purchaser is bound to go to the lands, and make inquiries from the tenants, but a mortgagee is not bound to do so. At all events, constructive notice by possession does not apply to a purchaser who has registered his deed. *Crofton v. Ormsby*(b). That may be inferred from what Lord Redesdale says in that case(d).

Mr. Pennefather, Q.C., Mr. Warren, Q.C., Mr. Brewster, Q.C., Mr. Blake, Q.C., and Mr. Fitzgibbon, for Mrs. Hamilton.

1. The deed of 1821 is not voluntary. The question is not as to the *quantum* of consideration. If there be *any* consideration, beyond the nominal one of 10s., the court will sustain the instrument. There were valuable considerations here, any one of which would be sufficient. Mr. Hamilton was embarrassed, and resolved to sell part of his estate. Mrs. Hamilton was entitled to dower, and the purchasers would not complete their purchases, unless she joined in the conveyances. She consented, under the advice of Mr. Borrowes, on condition of obtaining this deed of 1821. This is clearly proved, both by the testimony of Mr. Borrowes, and documents which

(a) 19 Ves. 435.

(b) 2 Ech. &amp; L. 53.

(c) p. 59.

have been proved in the cause. The conveyances to the purchasers, after having been executed by her, were deposited in the hands of a third person, and it was stipulated that they were not to be handed over until Mr. Hamilton executed the deed of 1821. This is the first consideration we rely on. *Secondly*—she surrendered the arrears which were then due on foot of the deed of 1815, which we admit was voluntary. It is also clearly proved, by documentary evidence, that the cancelling of that deed, and a re-conveyance of her right under it, formed a part of the consideration of the deed of 1821. There is a *third* consideration, which is stated in the instrument itself. It was thereby stipulated between all the parties, including, of course, the trustees, that Mrs. Hamilton should never sue for maintenance or alimony, and that she should maintain the five children which had been the issue of the marriage. There is an express covenant by the trustees, Mr. Browning and Mr. Bernard, binding on them and their heirs, that Mrs. Hamilton shall maintain the children.—[LORD CHANCELLOR. You contend that the covenant is, not that she shall support them out of the £600 a-year granted by the deed, but that she shall maintain them at all events, and you contend that the trustees would be liable to an action if she did not?]—That is the effect of the instrument. Thus we have established three distinct considerations, any one of which would be sufficient to support the deed.

*Secondly*—Although the deed of 1821 was not registered, yet we contend that it ought not to be postponed to the mortgage of 1825, although the latter has been registered. The agent of the mortgagee had clear notice of our deed. It is not a question of notice merely, but of actual fraud. Bernard was one of the trustees in our deed of 1821; he executed that instrument; he was also land and law agent of Mr. Hamilton, and so continued at the time of the execution of the mortgage. The mortgagee chose to employ him as *his* agent also, and must take the consequences. Bernard prepared the deed of 1821 and the mortgage of 1825. The circumstances that took place in the interval between 1821 and 1825 are material. Shortly after the deed of 1821 was executed, Mr. Burrowes, the agent of Mrs. Hamilton, took it to the Registry Office, in order to have it registered. The officers were busy, and he left the deed and the memorial in a press in the Registry Office. It was purloined or removed from thence, and thus the registry of it was prevented. Bernard's name was on the back, he having prepared it; this would facilitate his getting it into his possession. He was suspected of having it, but denied all knowledge of it. Mrs. Hamilton at last filed a bill in 1824, to have that instrument produced. Bernard was served with process, but evaded answering. The mortgage was in 1825; Bernard died in 1828. After his death, our deed of 1821 was found amongst his papers. Applying the law to these facts, there is

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*Surrender  
of arrears due  
under volun-  
tary deed of  
1815.*

*And that  
consideration  
stated in deed,  
viz., the cove-  
nant by trus-  
tees, that Mrs.  
Hamilton  
should support  
the children  
was a good  
consideration.*

*2dly. That  
mortgagee had  
notice through  
his agent.*

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That the  
rule, that no-  
tice through  
an agent must  
be in the same  
transaction  
does not now  
prevail. "

sufficient to affect the mortgagee with notice. It is true, that a considerable time ago there was something like a rule, that notice to the solicitor, in order to affect the client, must be in the same transaction. The case of *Wyatt v. Barwell*(d) must be taken with qualification. *Le Neve v. Le Neve*(e) is a clear authority as to the effect of notice in a case of a registered instrument. In *Tunstall v. Trappes*(f), it was not contended that Nicholas Pocock had any actual notice of Gosling's judgment, but his attorney had actual notice of it. Pocock's mortgage was registered, the judgment was not. In *Montford v. Scott*(g), Sir John Leach is reported to have said, that notice to the solicitor must be in the same transaction, in order to affect the client: but that was a mistake of the reporter, or, at all events, is corrected by Lord Eldon, when that case came before him on appeal (h). Lord Eldon said, that one transaction might follow so close upon the other, as to render it impossible to give a man credit for having forgotten it. The court cannot give Mr. Bernard credit for having forgotten our deed, which he then had in his possession, in which he was trustee, and under which Mrs. Hamilton was, as he knew, receiving the rents. In *Hargraves v. Rothwell*(i), Lord Langdale, referring to *Montford v. Scott*, said he entirely concurred in Lord Eldon's observations in that case.—

[LORD CHANCELLOR. I never could understand what is said in *Montford v. Scott*, as establishing the position you contend for. Sir John Leach said that the principal was a stranger as to any transaction in which his agent had been previously concerned. But Lord Eldon said, that one transaction might follow so close on the heels of the other, that the agent must have had it in his recollection at the time of the second transaction. If that were taken to mean that the solicitor is bound to recollect and inform his client, and that the client must abide the consequences, though not informed, it would make it very dangerous to employ a solicitor who is in great business; it would be a very loose doctrine.]

It is undoubtedly a most imprudent act, and is perfectly well understood to be so, for a purchaser to employ the solicitor of the vendor. The purchaser must abide the consequences of his imprudence. In *Brotherton v. Hatt*(k), which is called the case of the three mortgages, all the securities were transacted at the shop of the same scrivener, who witnessed the deeds, and were agents to the several lenders. The third mortgagee was held to be affected with notice through his agents. Sir Edward Sugden says, citing Lord Talbot, that the reason of the rule, as to notice to the agent being notice to the party, is, that otherwise, a man who had a mind to get another's

(d) 19 Ves. 435.

(f) 3 Sim. 301.

(h) Turn. &amp; R 274

(e) 3 Atk. 643.

(g) 3 Mad. 34.

(i) 1 Keen, 154.

(k) 2 Vern. 573.

estate might shut his own eyes, and employ another to treat for him, who had notice of a former title (l). *Attorney General v. Gower*(m). In *Sheldon v. Cox*(n), notice of an unregistered mortgage was held to affect the subsequent mortgagees, who had registered; and Lord Northington there said, there was no difference between personal and constructive notice, except as to the moral guilt. In *Toulmin v. Steere* (o), the question, whether notice through an agent must be in the same transaction, was very fully discussed; and Sir William Grant decided, that the agent having complete and continued notice of the first instrument at the time the second was executed, it was constructive notice to the principal.

For the plaintiffs, in reply—

1. The deed of 1821 is voluntary. Three considerations are set up, viz., a surrender by Mrs. Hamilton of an alleged right to dower; a surrender of arrears said to be due under the deed of 1815, and thirdly, the covenant by the trustees that she should maintain the children. As to the first, Mrs. Hamilton had no right to dower. Mr. Hamilton's estates were under mortgage at the time of the marriage, and therefore, as he was only entitled to an equity of redemption, his wife was not dowable. The purchasers required her to join, *ex abundanti cautela*.

[LORD CHANCELLOR. The purchasers must have apprehended some danger from her rights. Whatever was *their* danger was *her* chance; and, such as it was, she surrendered it.]—

As to her surrender of the arrears due under the deed of 1815, the same thing was alleged, in order to support the deed of 1818, at the last hearing. There was no surrender of arrears. The deed of 1815 was a conveyance to trustees, and is in full operation at this day. The trustee has done nothing relinquishing it, and might bring an ejectment to-morrow. In *Berry, Ex-parte* (p), it was held, that if the second instrument was substituted for the first, with a design of making a colorable consideration, the court will not lend itself to that design.

Then, as to the covenant by the trustees being sufficient to support the deed, we contend that that was not an independent covenant, but must be taken along with the rest of the instrument. Mr. Hamilton could not enforce that covenant against the trustees; he must have averred and proved that he paid £60 a-year for each child.

2. Even if the deed of 1821 was not voluntary, the court will postpone it to our mortgage which is registered, while the deed of 1821 is not. We are a mortgagee for valuable consideration, without notice of the deed of 1821. The notice alleged is at best constructive. The court has every reason to presume that the mortgagee was wholly ignorant of the

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Mr. Blackburne and Mr. Martley's arguments for the mortgagee.

That lands were under mortgage at time of marriage, and wife could not be dowable out of equity of redemption.

That there was never any effectual surrender of the arrears due under voluntary deed of 1815.

That no action would lie on the covenant by the trustees

2dly. That even if the deed of 1821 was not voluntary, registered instrument must prevail over unregistered.

(l) 2 Sug. Vend. & P. 278.

(m) 2 Eq. Ca. Abr. 685.

(n) 2 Eden, 224.

(o) 3 Mer. 222.

(p) 19 Ves. 219.



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That notice  
through an  
agent must be  
in the same  
transaction.

deed of 1821. But it is said that his solicitor had notice. We rely on the principle, that the knowledge of the solicitor, in order to affect his client, must be knowledge acquired in the same transaction. That principle is established by a great many cases. In *Worsley v. E. Scarborough* (q), that principle is laid down in the most express terms; and it is added, that it would be very mischievous if it were otherwise, for the man of the most practice and greatest eminence would then be the most dangerous to employ.

In *Warren v. Warren* (r), the same rule was acted on, and Lord Hardwicke observed, that otherwise it would make purchasers' and mortgagees' titles depend on the memory of their counsellors and agents.

In *Loutherv. Carlton* (s), Lord Hardwicke laid down the same principle in express terms, and added, that if such were not the rule of the court, it would be of dangerous consequence, and would be an objection to the most able counsel.

In *Heirn v. Mill* (t), Lord Erskine speaks of the rule as to notice, using the words "notice in the very transaction."

In *Wyatt v. Barwell* (u), the notice was held not sufficient to counter-vail the registry. It was there expressly decided that constructive notice could not prevail against a registered deed: For that purpose *actual notice amounting to fraud in the purchaser* who has registered his deed must be proved. Sir William Grant says in that case, "What evidence is there of notice which makes it fraudulent in the 'incumbrancers?'" *Preston v. Tubbin* (v), is an express authority that notice to the agent in another transaction is not notice to the client. *Fitzgerald v. Fauconberg* (w), is an authority to the same effect.

As to *Le Neve v. Le Neve* (x) cited against us, it is demonstrable, that the defendant *Mary Le Neve* in that case was affected through her agent, by notice in the same transaction. In that case, the agent Norton was trustee for the party who was postponed. Bernard was not our trustee. The construction put on that case by the other side, would set it in direct contradiction to a series of authorities by Lord Hardwicke himself. In *Hargraves v. Rothwell* (y), there was no question of registry. That case therefore does not apply to the present question. In the case of *Smith v. Smith* (z), decided in this court, your lordship said: "It is to be collected from the authorities, that the knowledge of an agent to affect his principal with notice, must be a knowledge derived from one and the same transaction. Because all the know-

(q) 3 Atk. 392.

(s) 2 Atk. 242.

(u) 19 Ves. 415.

(w) Fitz. 211.

(y) 1 Keen, 151

(r) 3 Atk. 294.

(t) 13 Ves. 127.

(v) 1 Vern. 236.

(x) 3 Atk. 445.

(z) 2 Law Rec. N. 3. 157.

"ledge which the agent acquires in the same transaction, it his duty "to communicate; but if the knowledge be acquired by the agent in "another transaction, it is not his duty to disclose it, but the contrary." That case is also an authority to shew, that the circumstances of Bernard being a trustee in the first deed makes no difference in the case. No authority whatever has been cited to sustain such a distinction. Bernard was not bound to disclose the fact to Bachelor, but the contrary; how then can it be contended that Bachelor is affected by constructive notice in consequence of the knowledge of Bernard. It is regretted by many Chancellors that anything short of actual notice to the party himself was ever permitted to defeat a purchaser for valuable consideration.

LORD CHANCELLOR.—Before I decide which of these two deeds is to have priority, I must look into the cases which have been cited. It is a question of great importance. At the former hearing it was suggested, that it might become unnecessary to determine the point, as it was not then ascertained that the fund would prove deficient. It now appears that the fund will be inadequate, and it becomes necessary to determine which of these two deeds is to have priority. The first question is, whether the deed of 1821 was voluntary or not. If it was a voluntary deed that would put an end to the question whether Bachelor the mortgagee had notice of it or not. *First*, then, was it a voluntary deed? On the best consideration I have been able to give to the case, I think it was not a voluntary deed. I will not permit myself to be led by feelings which would naturally induce me to support an instrument intended for the maintenance of this lady and her children, under the circumstances in which she has been placed, but I look on it as a question of mere law, whether the deed is voluntary or not. I think it is sustained, first, by evidence of a consideration which does not appear on the deed, and secondly by a consideration which is expressed on the face of the instrument. Circumstances, not stated in the deed, may be resorted to in evidence, to prove consideration, if those circumstances are not inconsistent with what is expressed in the deed. I do not see anything in the deed inconsistent with the considerations extrinsic to it, which have been proved in the cause. A question is raised whether Mrs. Hamilton had a title to dower or not. If her husband, at the time of the marriage had only an equity of redemption, no doubt she would not be entitled to dower. But why did the purchasers refuse to complete their purchases, until Mrs. Hamilton joined in the deeds? It must have been to bar *some* right which she had at the time. Her settlement was made after marriage. It appears to have been considered by all the parties, that her joining was necessary, to make a good title; and after the deeds had been executed by the pur-

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Notice of the contents of a voluntary instrument has no effect in postponing a purchaser for valuable consideration.

Evidence of a consideration not expressed in a deed is admissible, to shew that it was not voluntary unless inconsistent with the deed itself.

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A deed of annuity, by husband to wife, by way of separate maintenance, in which two trustees covenant that wife shall support the five children of the marriage, is not a voluntary deed.

The intention of the registry act is, that the registered instrument is not to be postponed, unless the notice of a prior instrument is very distinct.

The cases have gone far enough in opening transactions on the ground of notice.

chasers, they refuse to pay the money, till Mrs. Hamilton had executed. Under the advice of her solicitor, Mr. Burrowes, she said "No, not until I am secured the annuity by the deed of 1821." It is true, the proof of these considerations rests mainly on the evidence of Mr. Burrowes, given by him in answer to the concluding general interrogatory. I think there would have been objections to evidence so given, if no opportunity of cross-examining Mr. Burrowes had been afforded to the plaintiffs, but they obtained an order to cross-examine him, and did not afterwards do so. But it does not rest on the parol testimony only, of Mr. Burrowes. He proved documents which leave no doubt of the existence of the considerations; documents shewing the position of the parties, and Mrs. Hamilton's refusal to execute the conveyance to the purchasers, until the deed of 1821 was secured to her. This proves that she did give a valuable consideration for that deed.

So far as to extrinsic circumstances. Then as to what appears on the face of the deed.—There is a covenant by the trustees, that the maintenance of the children shall be paid for by Mrs. Hamilton. That is sufficient to take this deed out of the ordinary rule relating to voluntary conveyances. The trustees would be liable to an action on that covenant. But it is said that an action could not be maintained on that covenant by Mr. Hamilton, unless he paid the annuity. I cannot subscribe to that opinion. There is also another circumstance which appears in the deed. It was thereby agreed that Mrs. Hamilton was never to put in a claim for alimony. I have gone fully into this part of the case, because if the deed were voluntary, that would determine the case.

The question as to the effect of the registry of the mortgage is a much more doubtful question. I must look into the authorities before I come to any decision on this point. The intention of the registry act is, that the registered instrument shall not be postponed, unless the notice of a prior instrument is very distinct.

The cases have gone far enough in opening such transactions on the ground of notice. I have to consider this as a case of actual fraud on the part of Bernard. It must, I think, be looked on as a fraud by him in that very transaction. It appears that immediately after the deed of 1821 was executed, Mr. Burrowes took it to the registry office to have it registered, and the officers being busy at the time, he imprudently left the deed in a press in that office, from whence it was purloined. If that deed had been registered, this question would not have arisen. It is said, that it is not proved that Bernard purloined the deed: but he must have made some representation by which he was enabled to get possession of it.

Mrs. Hamilton, being disappointed in the registry of her deed, files a bill stating these facts, and Bernard is served with process to appear and answer. Mr. Hamilton seems at this time to have been out of the way. Bernard is charged with subtraction of the instrument. Motions are made in the cause. Bernard, undertakes to put in an answer, but does not, though he puts in an answer for Wilton as his solicitor. After his death, the deed is found amongst his papers: can I say it came there innocently? Besides they have not examined Gibbons, who it seems was the clerk of Bernard and procured the restoration of the instrument after his death.

However the case is decided, the loss must fall on an innocent person. Bachelor was an innocent purchaser for valuable consideration. So was Mrs. Hamilton. The question for my consideration does not rest on notice only, independent of fraud, but must be taken as a case of actual fraud by Bernard, who is defrauding Mrs. Hamilton, and suppressing her deed, while he is the instrument employed by Bachelor.

It is very difficult to make the title of a purchaser depend on a question of constructive notice. In the case in which Lord Eldon differed from Sir John Leach, he is represented as having said in effect, that the rule which Sir John Leach had acted on was inaccurate. But Lord Eldon did not decide the point in that case. He affirmed Sir John Leach's decree, though upon other grounds. I find it very difficult to put any other interpretation on the observation made by Lord Eldon, in that case, than that it grew out of the supposition of its being a fraudulent thing. I think, he puts the supposition of so short a time intervening between the two transactions, as an illustration of a case of fraud, and then he says, in that case, *being a case of fraud*, the principal will be affected with notice. I can suppose twenty other cases in which the fraud of the agent must necessarily be presumed from the circumstances, and the court, if convinced of the fraud, would then according to the view which, I think, Lord Eldon took in that case, consider the principal affected with notice. Here, the attorney, with perfect knowledge of all the family transactions, and of the deed of 1821, being actually a trustee in that deed; knowing also, that Mrs. Hamilton received the rents—it is not mere suspicion in this case, but a moral certainty, that he was guilty of fraud. However I do not at present decide, whether the principal is to be affected with the consequence of that fraud, but will look into the cases.

*Saturday, 8th December.*

THE LORD CHANCELLOR, on this day, again adverted to the facts of this case and the opinion he had before expressed, which after consideration he adhered to. His Lordship observed, that the reason why notice

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If one of two innocent persons is to suffer by the fraud of a third, the person who employs the fraudulent agent must suffer, rather than the person who did not employ him.

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to the agent is notice to the principal, if the knowledge has been acquired in the same transaction is, that in that case it must be fresh in the agent's recollection, and it is a fraud in him not to disclose it to his principal. It is the circumstance of fraud that makes the distinction, and that was the ground on which Lord Hardwicke decided the case of *Le Neve v. Le Neve* (aa). It had been said that there was a difference of opinion between Lord Eldon and Sir John Leach in the case of *Montford v. Scott* (bb). Lord Eldon's observations were rather a criticism on those of Sir John Leach: his decree was the same, though on a different ground. From the words of Lord Eldon, it is to be inferred that it must depend on the circumstances established in each case, whether the notice to the agent is or is not to be considered as notice to the principal, and that if the agent, at the time of the transaction, has such clear notice of the prior deed that he could not have omitted to disclose it to his principal without fraud, the principal will be affected with that knowledge. Consequently there is, strictly speaking, no inflexible rule that the knowledge must of necessity have been acquired in the same transaction. The case of *Toulmin v. Steere* (cc), bears out the same conclusion. Referring to the case of *Smith v. Smith* (dd), cited in support of a contrary doctrine, his Lordship said, that if his language in that case meant that the notice must be proved to have been received in the same transaction, and is incapable of being proved by any other circumstances, that is not now his opinion; but if it meant that notice to the agent in the same transaction is notice to the principal without further proof, and that there was no such proof in that case, that proposition was correct. The decision here would not interfere with the decision in *Smith v. Smith*. Without infringing on the authorities, he thought he might say, that knowledge acquired by the agent in one transaction, may, under certain circumstances, be held binding on the principal in a second transaction, and that if the notice be so clearly proved, that no one can doubt that it was fraud in the agent to conceal it from his principal, it is ground for holding it notice to the principal. In the present case there was full evidence of actual fraud in the agent, and the principal must be held answerable.

(aa) 5 Atk. Ld. Harwicke's judgment, p. 654. (bb) 3 Mad. 34, T. & Russ. 274.  
(cc) 3 Mer. 222. (dd) 2 Law Rec N. S. 157.

## ROLLS.

*Thursday, Nov. 8th.*

**PLEADING—PARTIES—SALE UNDER DECREE—1 W. 4,  
c. 47, s. 12—ASSETS OF DECEASED EXECUTOR—LIA-  
BILITY OF.**

**OLDHAM and others v. WILKINS and others.**

The questions in this case came before the court on the exceptions to the Master's Report of good title. The exceptions were:—

First—That Thomas Wilkins, William M. Wilkins, and J. Craythorne Wilkins, having ultimate remainders in the lands, were not before the court, and therefore not bound by the decree.

Second—That the Master should have reported that good title could be made, provided the above-mentioned parties joined in the conveyance.

The estate sold was the real estate of John Craythorne. The suit was instituted by certain persons, claiming to be his creditors, to have the trusts of his will carried into execution. By that will, dated the 13th of May, 1824, John Craythorne devised all his estates, real and personal, to the Rev. William Cooper and Charles Wilkins, upon trust: first, to pay all his just debts, &c.; and, in the next place, to pay certain annuities, and subject thereto, to the use of his son, George Craythorne, for his life, with remainder to his issue; and, in default of such issue, to Martha Wilkins for life, with remainder to and amongst such of her children as shall be living at her decease, in equal shares, &c. A codicil to this will, dated the 4th of June, 1824, empowers the trustees to sell the real estate, *and re-invest the produce in permanent security.*

Charles Wilkins is surviving trustee and executor of George Craythorne. George Craythorne, the testator's son, died without issue. Martha Wilkins has several children living, three of whom, viz., Thomas Wilkins, William M. Wilkins, and J. C. Wilkins, are not before

J. C., by his will, devised all his estates, real and personal, to trustees, first, to pay all his debts, &c.; next, to the use of his son, G. C., for life, with remainder to his issue; and if G. C. should die without issue, to M. W. for life with remainder to such of her children as should be living at her death, in equal shares. G. C. having died without issue, and M. W. having several children living—*Held*, that in a suit by the creditors of J. C. to have the trusts of his will for payment of his debts executed, and praying a sale of the real estate, all the children of M.

W. are necessary parties.

The real estate having been set up to be sold under the decree in this cause, and the children of M. W. all being nominal parties; but three of them being, as stated in the bill, out of the jurisdiction, the person declared the highest bidder having excepted to the Master's report of good title, on the ground that the absent children of M. W. would not join in the conveyance, and were not bound by the decree—*Held*, that the exceptions were irregular, being exceptions not to title, but conveyance; but that the exceptant could not be compelled to complete his purchase, as the objection of the want of parties was fatal.

*Held*, also, that the 1 W. 4, c. 47, s. 12, does not apply to this case.

Where J. C. was executor of R. C. and died, leaving unadministered a portion of R. C.'s assets, which came to the hand of C. W., as executor of J. C.—*Held*, that the proper assets of J. C. were exonerated and not liable for the default of C. W. respecting R. C.'s assets.

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the court, being stated in the bill to be out of the jurisdiction, in America.

Messrs. *Keatinge*, Q.C., and *Robert Molesworth*, for the *exceptant*—

*Craythorne's* trustees have power to sell and re-invest for the benefit of the *celles que trust*, but have not power to sell for payment of debts; and if they had, and were therefore competent to make title to a purchaser out of court, yet they could not be considered as executing their power by joining in a conveyance pursuant to the compulsory order of this court, for neglect of which they would be sent to gaol. Therefore, even though there was an express power to sell for payment of debts, the title under the decree must be considered as independent of it.

Generally, all the *celles que trust* of real estate are necessary parties to a bill praying for a sale of that estate for payment of debts. *Faithful v. Hunt*(a); *Browne v. Blount*(b). Even where the will contains a provision, which there is not here, that the receipt of the trustees shall be a sufficient discharge to a purchaser, the *celles que trust* must be before the court. *Osbourn v. Fallons*(c); *Newton v. Lord Egmont*(d).

There is, however, a certain class of cases in which the court has proceeded, in the absence of some parties who would have been necessary, if within the jurisdiction. But it is remarkable, that these very cases furnish opinions against the validity of the title thus sold. *Leahy v. Dancer*(e); *Gowan v. Tyghe*(f). The absence of a *cestui que trust* is a defect in the title to a purchaser, because courts of equity do not hold persons, having equitable interests in real estate, bound by proceedings taken in their absence, either as to the validity of incumbrances, or the accounts taken on foot of them of the sums for which the estate is sold; and therefore, as to the absent parties, the purchaser is no more than assignee of the incumbrances, the validity and amount of which may be afterwards disputed. Accordingly, it has been held, both by your Honor and the Lord Chancellor, that judgment creditors, puisne to the plaintiff's demand not being before the court, was an objection to the title. *Piers v. Piers*(g), and *Coram Can.*(h). Therefore, in the absence of the sons of Martha Wilkins, to whom remainders are limited, a good title cannot be conveyed under this decree, even if it was perfectly consistent with their rights; for they are not bound by it and have an interest in disputing the plaintiffs' demand.

But we are now to apprise your Honor of some of the proceedings which have been had in this cause, as they are remarkably illustrative

(a) 3 Anst. 75.

(c) 1 Russ. & Myl. 741.

(e) 3 Mol. 104.

(g) 5 Law Rec. N. S. 24.

(b) 2 Russ. & Myl. 83.

(d) 4 Sim. 583, & 5 Sim. 584.

(f) 3 Mol. 113.

(h) D. & W. 88.

of the necessity of having the proper parties before the court, and of the peculiar risk of a purchaser's title under the decree in this cause.

The bill in this cause is filed by the plaintiffs, as legatees of one Richard Conlan, who died in 1802, having, by his will, duly executed, appointed John Craythorne as his executor; and the decree is against John Craythorne's assets, for liability incurred by him in that capacity. Charles Wilkins, the defendant, is the surviving and sole acting trustee and executor of Craythorne. The report finds that Conlan's assets consisted, amongst other things, of 23 Grand Canal Debentures, and that these, at the time of Conlan's death, were worth £1949 5s.; and that they came in *specie* to the hand of the defendant Wilkins, and were sold by him for £910, but would have produced, at the date of the report, the sum of £1311. It further finds, that, another part of Conlan's assets, viz., rents out of certain premises in Castle Market and Drury-lane, were received by Craythorne, and, after his death, by Wilkins, altogether amounting to the sum of £838 15s. 4d. It further finds, that Wilkins, as the executor of Craythorne, is indebted to his assets in a sum of £5000, being much more than sufficient to discharge all the demands in this cause. The final decree charges Craythorne's assets with the sum of £1311, which the canal debentures ought to have produced; and also with the sum of £838 15s. 4d., the greater part of which had been received by Wilkins; it declares Craythorne's real estate charged with certain annuities by his will, and provides for all these demands and costs by the sale of the real estate; and, with a little ambiguity, perhaps not altogether accidental, it gives Wilkins, the defaulting executor, his costs out of the real estate, or at least out of Craythorne's assets.

Now, this decree is, for the most part, if not altogether, erroneous, and, in the language of equity, a *fraud* upon the absent children of Martha Wilkins; for it purports, in perhaps its least exceptionable part, to be a decree in favor of persons suffering by a *devastavit* by Craythorne, as Conlan's executor, and claiming the amount out of Craythorne's real estate, under a trust in his will, for payment of his debts. It is quite settled, that real estate is not thus liable. *Price v. Morgan*(i), recognised in *Hollis v. Carr*(k). But further, it is to be borne in mind that the defendant, Charles Wilkins, is executor of Craythorne, and is therefore the personal representative of Conlan as well as Craythorne. The report finds that assets came from Craythorne to the hands of Wilkins, more than sufficient to discharge the debt to the assets of Conlan, and therefore Craythorne's assets were exonerated. *Tyler v. Bell*(l). But this decree charges Craythorne's assets for the default and mismanagement of Wilkins. Here, fraud against the absent *celles que trust* is pa-

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(i) 2 Chan. Ca. 215.

(k) 1 Vern. 431.

(l) 2 Myl. & Craig, 89.



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tent on the face of the proceedings. They and their trustee, Charles Wilkins, have adverse interests; and the decree is for sale of their estates, to satisfy demands to which these estates are not properly liable. Under such a decree the purchaser cannot have a good title, where the *celles que trust* are not before the court, and do not join in the conveyance.

There is a class of cases, in which purchasers under decrees have been successfully impugned, where fraud against minors, though before the court, has been apparent on the face of the proceedings, even where the minors had only an equitable interest. *Kennedy v. Daly*(*m*); *Lightburn v. Swift*(*n*); *Gore v. Stackpoole*(*o*). The case of absent *celles que trusts*, who are probably alike ignorant of their rights and the frauds practised against them, seems analogous to, and quite as strong as, the case of minors. In the case of a private sale under a power, if the purchaser was aware that the purchase money was to be applied in payment of debts to which the estate was not properly liable, there can be no doubt, on the authorities, that such purchase could be successfully impeached. Here is fraud upon the face of the proceedings; the purchaser, therefore, has notice of it, and the decree of this court cannot give any better title than private sale by the trustees under a power would give. We therefore submit that the present exceptions must be allowed.

Messrs. *J. H. Blake, Q. C.*, and *R. C. Walker*, contra. The objection as to the decree is now stated for the first time at the bar, and is not the ground of either of the exceptions of which notice has been given. At any rate, it is not a valid objection, where the proper parties are before the court. *Bennett v. Hamill*(*p*).

The only question in this case is, whether it was indispensable that the persons named in the exceptions should have been before the court. We submit it was unnecessary. The legal estate is represented before the court by the trustees, who have power, under Craythorne's will, to sell for payment of debts. Martha Wilkins, being the heiress-at-law and tenant for life, is also before the court, and her children, who have only a future and contingent interest, are sufficiently protected; they are not necessary parties. *Rutland v. Wakeman*(*q*); *Adair v. New River Company*(*r*); *Corder v. Morgan*(*s*); *Calvert's Suit in Eq.* 213.

The trustees alone, out of court, would be competent to convey to a purchaser, in order to discharge debts. The decree requires them to do only what in their discretion they have power, and ought to do; the trustees and the tenant for life are willing to convey; and it is difficult

(*m*) 1 Sch. & Lef. 355.

(*n*) 1 Dow. 30.

(*q*) 8 Bro. P. C. 145.

(*n*) 2 B. & B. 212

(*p*) 2 Sch. & Lef. 566.

(*r*) 11 Ves. 429;

(*s*) 18 Ves. 346.

to perceive the reason why the same conveyance, which out of court would carry an indefeasible title, is to lose its efficacy when it happens to be in pursuance of the decree of this court.

The exceptions are at any rate informal, and taken improperly; they are, in fact, exceptions to conveyance and not to title, and should therefore be overruled. *Binks v. Lord Rokeby* (t).

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THE MASTER OF THE ROLLS said he would look into the cases that had been cited; and on a subsequent day, having adverted to the exceptions in this case, his Honor said he wished to call counsel's attention to the 1 W. 4, c. 47, s. 12, which he was disposed to think provided for the difficulty which had been suggested in this case. But if the counsel thought otherwise, he would be happy to hear them on the subject.

Thursday, November 22d.

Accordingly, upon this day, Mr. R. Molesworth, for the *exceptant*, submitted that the 1 W. 4, c. 47, s. 12, does not apply to this case, as that act was not designed to give a decree efficacy against a party who would not otherwise be bound by it. The 11th section, would according to its literal import, make decrees operative against infants not parties to the cause; though it is evident that the condition of their being parties should be added to the literal import of that, and also of the following section. The primary object of the 12th section was to obviate a difficulty in conveyances to purchasers, from contingent remainders not being capable of being conveyed so as to pass an estate, which arose chiefly in cases of devises to trustees, and the survivors of them and the heirs, &c., of such survivor. The section then goes on to provide for the difficulty of procuring conveyances from absent, or perhaps obstinate persons bound by the decree. But it cannot be supposed, that it was intended indirectly to make a decree operative against parties who, being out of the jurisdiction, could never be served with process. There are several statutes respecting process, where the parties are out of the jurisdiction; and each subsequent act refers to those that have preceded it on the same subject. But the 1 W. 4, c. 47, makes no reference to former acts, relating to process where parties are out of the jurisdiction; and is not referred to by subsequent acts on that subject. It is therefore to be presumed, that this statute was not intended to apply to the case of persons out of the jurisdiction and not bound by the decree.

Statutes enabling Courts of Equity to direct conveyances by one party, to operate on the estate of another, have received a strict construction:

(t) 2 Mad. 227.

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*Merry in re (u)*; *Mather v. Thomas (v)*; *Goddard in re (w)*; *Payne c. p. (x)*.—[MASTER OF THE ROLLS. Have not these cases been overruled?]*—Partly in Whitton c. p. (y)*; but that was upon the construction of the 1 W. 4, c. 60, coupled with a subsequent act.

The 1 W. 4, c. 47, s. 12, applies only where the decree is for payment of the testator's debts merely, and not where it is for payment of annuities and legacies under the will, as well as debts, as is the case here. If it should be held that the decree, within the meaning of this section, need not be for debts exclusively but may be for legacies also, then, it will be impossible to determine the proportion which the debts should bear to the legacies, and therefore the debts may not amount to more than £5, and the legacies may amount to £5,000, for which the real estate is to be sold under the decree. This could not be maintained: the act, in its terms, applies only to decrees for payment of debts; and if the decree is for payment of legacies as well as debts, it is not within the meaning of this statute. The sale and conveyance to a purchaser under such decree in the absence of parties entitled in remainder, would be totally invalid; on the same principle which renders the execution of a power, partly according to its provisions, and partly not, totally void, where the parts are inseparable.

Sergeant *Greene* for the plaintiffs, *contra*, insisted that the 1 W. 4, c. 47, s. 12, applies exactly to this case; for under a decree for paying off debts, as this substantially is, this act renders the conveyance to a purchaser, though made by a person having a limited estate, effectual as if by a tenant in fee. Many of the cases cited upon the other side have been overruled, and could not apply here; as they arose upon the 1 W. 4, c. 60, which is merely to give to one the power of conveying for, and in the name of another, and is altogether *alio intuitu* from that of the 1 W. 4, c. 47.

*Tuesday, Nov. 27th.*

On this day His HONOR delivered his judgment, in substance, as follows:—

This case comes before the court, upon exceptions to the Master's report of good title, to certain lands sold under the decree in this cause. The exceptions are, &c. \* The bill was filed by the daughters of one Richard Conlan, to raise out of the real estate of John Craythorne the amount of certain legacies to which they were entitled under their fa-

(u) 1 M. & K. 677.

(x) 6 Sim. 615.

(v) 10 Bing. 44.

(w) 1 M. & K. 25.

(y) 1 K. 275.

\* See ante, p. 59.

ther's will. John Craythorne was the surviving executor of Conlan, and the bill charges Craythorne as a defaulting executor. An account is decreed to be taken, of the sums due to the plaintiffs for their legacies. Under this decree there is a report, finding that assets, sufficient for carrying Conlan's will into effect, came to the hands of Craythorne; and that Craythorne being seized and possessed of real and personal estate, which it particularly sets forth, by his will devised the same, upon certain trusts, to the Rev. William Cooper and Charles Wilkins, as the trustees and executors of his said will, and that Charles Wilkins is the surviving trustee and executor of Craythorne. The report finds, especially, that twenty-three canal debentures, being part of Conlan's assets, came specifically to the hands of Wilkins, as such executor, and were sold by him at an undervalue. It further finds that Wilkins is indebted in the sum of £5000 to Craythorne's assets. The final decree charges Craythorne's assets with several sums, and, amongst others, with the sum which the canal debentures *ought* to have produced, and, for payment of these, directs a sale of his real estate.

It is remarkable that by Craythorne's will, his estates are devised to Cooper and Wilkins, *merely*, and not to their heirs, and assigns.—[His Honor here stated the will and codicil, as already given.\*]—Of this will, the defendant, Charles Wilkins, is the surviving trustee and executor. George Craythorne, the testator's son and devisee, died without issue. Upon his death, Martha Wilkins became heiress at law of John Craythorne, and tenant for life of the lands devised, with remainder to her children, who shall be surviving at her death, *in equal shares*.

The parties, defendants to this suit, are Charles Wilkins, the surviving trustee and executor of John Craythorne; Martha Wilkins, the testator's heiress at law and tenant for life under the will; and the seven children of Martha Wilkins, three of whom are stated and proved to be out of the jurisdiction.

Pursuant to the final decree, Craythorne's real estate has been set up to be sold, and the present exceptant declared the purchaser. The Master has reported a good title; but to this report exceptions have been taken, which, in fact, amount to this, that the three children of Martha Wilkins who are out of the jurisdiction, though nominal parties, are not bound by the decree. Now, according to the case of *Binks v. Roheby* (z), these exceptions are, properly, exceptions to conveyance and not to title; for the exceptant does not mean to deny that the title, upon which the Master has reported, is good; but to object that this title cannot be conveyed, for want of necessary parties, who will not join in the conveyance, and who, not being before the court, will not be bound by the decree. In point of form, therefore, I must overrule

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these exceptions. But as I learn, from the defendants' solicitor, that the absent parties will not join in conveying to a purchaser under this decree, and as exception would therefore be clearly open to the exceptant when the Master should come to settle the conveyance, I shall, for the convenience of all parties, notwithstanding the point of form, now give my judgment, fully, upon the question raised by these exceptions.

The question is, were the absent children of Martha Wilkins necessary parties in the cause? In Lord Redesdale's Treatise it is laid down, p. 31, 32, 133, 141, that all persons materially interested ought to be parties to the suit, if within the jurisdiction of the court; and if absent parties are to be active in the performance of a decree, or if they have rights wholly distinct from the rights of the other parties, the court cannot proceed to a determination against them. Again he says, p. 141, contingent limitations and executory devises to persons not in being, may be bound by a decree against a person claiming a vested estate of inheritance; but a person in being, claiming under a limitation by way of executory devise, not subject to any preceding vested estate of inheritance, by which it may be defeated, must be made a party to a bill affecting his rights. The case of *Browne v. Blount* (aa) is exactly in point: it decides that the *celles que trust* of real estate are necessary parties to a bill to sell that estate for payment of debts.

But we are now to examine the exceptions to the general principle, and see if this case falls within any of them. The case of *Adair v. New River Company* (bb) refers to a very numerous class of cases, in which it has been held that persons entitled to debts and legacies are not necessary parties, when the trustees are before the court; but such cases are not in point. The *Duchess of Rutland v. Wakeman* (cc) comes nearer. There, however, the devise was to the trustees, *their heirs* and assigns; and the trustees had power to give discharges. But, moreover, the heir at law *consented to convey*, so that as to him no question could have arisen; and therefore, that case is not to be considered as establishing the proposition that persons entitled under the ultimate limitations are not necessary parties. It is further remarkable that Lord Redesdale, when treating upon the subject, does not refer to that case. *Williams v. Whinyates* (dd) comes nearest. The report of that case, however, is not by any means full or satisfactory: and in *Smith v. The Hibernian Mining Company* (ee), Lord Redesdale, observing upon *Williams v. Whinyates*, says, "the heir might file a bill," i. e. the heir, being absent, is not bound by the decree.

The cases go to shew that creditors or legatees, for whom trustees are appointed, are not necessary parties, the trustees being before the court; but that the heir, who may have an interest adverse to

(aa) 2 Russ. &amp; Myl. 43.

(bb) 11 Ves. 429.

(cc) 5 Bro. P. C. 145.

(dd) 2 Bro. Ch. c. 399.

(ee) 1 Sch. &amp; Lef. 240?

the will, or persons entitled to the ultimate estates limited, or the devisees of residue, all of whom have an evident interest in checking the account with which their estates are to be charged, are necessary parties, and must be before the court.

Now, in this case there are various objections to the decree. It appears on the face of the report, that Wilkins, being surviving executor of Craythorne, who was surviving executor of Conlan—thus being the personal representative of Conlan, as such, received the unadministered assets of Conlan, viz: twenty-three canal debentures, and rents out of the premises in Castle Market and Drury-lane. For these, the decree charges Craythorne's assets; and in this respect, at least, it is certainly erroneous, as appears by *Tiler v. Bell* (ff), relied on by Mr. *Molesworth* in his argument on this part of the case. It is quite clear that Craythorne's assets should not have been charged for the default of Wilkins; and yet these charges, which are certainly mistaken, form the heaviest items in the account, for the discharge of which Craythorne's real estate is directed to be sold. The trustees in this case could not give discharges to a purchaser, at a sale for payment of debts; as their power is limited to sell for the purpose of re-investment. It is even doubtful whether or not they have the legal estate; probably, they have not, beyond the mere trusts.

But, that the children of Martha Wilkins are necessary parties to this cause, appears to have been admitted by the plaintiffs themselves, who named them as parties in the bill. That they are necessary parties, further appears from *Berry v. Askham* (gg), which is very similar to the case now before the court, *Anon.* (hh), if law is conclusive. *Clanmorris v. Bingham*, (ii); *Newton v. Egmont* (kk); *Cocker v. Egmont* (ll); *Calverly v. Phelp* (mm). These cases shew that a purchaser cannot be compelled to accept the title, unless the persons entitled to ultimate remainders are parties to the conveyance.

Upon further consideration, I think the 1 W. 4, c. 47, s 12, does not apply to a case like this, where the plaintiffs' proceedings are defective for want of necessary parties. When the proper parties are before the court, the court may order the person having the limited estate to convey; but not otherwise.

Overrule the exceptions; but let the order be without prejudice to the purchaser's applying to be discharged from his purchase, in case J. C. Wilkins, William M. Wilkins, and Thomas Wilkins, the Children of Martha Wilkins, do not join in the conveyance to the said purchaser; and let the purchaser abide his own costs of the hearing; and let the deposit be paid back to him; and the plaintiffs have their costs as costs in the cause.

(ff) 2 Myl. & Cr. 89.

(gg) 2 Vern. 28.

(hh) 12 Mod. 560.

(ii) 1 Mol. 511.

(kk) 4 Sim. 525 & 5 Sim. 137.

(ll) 6 Sim. 311,

(mm) 6 Md. 22).

1 Russ. & Myl. 41.

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• *Saturday, November 24th, 1838.*

# BILL FOR INJUNCTION AND ACCOUNT.

NEWENHAM v. O'SULLIVAN and others.

If a bill for an injunction prays for an account and answer from any of the defendants, all of the defendants must be served before moving on the bill.

Counsel on behalf of the plaintiff applied for an injunction to restrain the cutting of turf for sale, upon certain lands in the county of Lime-  
rick, or the carrying away of the turf already cut. The bill was filed the 24th of October, and prayed an injunction against O'Sullivan and the several other persons in the bill named, to whom O'Sullivan had set the ground, for the purpose of cutting turf for sale: and also prayed for an account and subpoena to answer against O'Sullivan, and another defendant named O'Regan, who had a legal interest in the premises, as a trustee for O'Sullivan. O'Sullivan was not served with subpoena, being out of the jurisdiction; and for O'Regan, (who, although served, had not appeared,) a parliamentary appearance had been entered.

THE MASTER OF THE ROLLS having called for the Rolls' certificate, by which it appeared that the several undertenants of O'Sullivan had been made defendants, but as to whom only an injunction had been prayed, had not been served, said:—

On this bill, as it stands at present, an injunction cannot be obtained, as it is not the common Irish injunction bill, on which an injunction is always granted ex-parte, but prays for an account and answer from some of the defendants; in fact, it mixes up the two kinds of injunction bill, in a manner which the court cannot sanction. All the defendants in this bill must be served with subpoena; or such of them as the plaintiff does not choose to serve may be struck out of the bill, and counsel had better consider which course should be adopted; but either will be necessary before I can make any order for an injunction.

*Tuesday, Nov. 27th, 1838.*

**MORTGAGEE IN POSSESSION—APPLICATION BY, UNDER SHERIFFS' ACT, FOR A RECEIVER OVER HIS OWN POSSESSION.**

**JAMES ADAMS, Petitioner; WILLIAM HORN, Respondent.**

Mr. LITTON, Q.C., (with whom was Mr. *Edward Meares Kelly*,) moved to shew cause against the conditional order of the 16th day of June, 1838, for a receiver, under the sheriffs' act.

The petition and verifying affidavit, upon which the conditional order was obtained, stated—

That petitioner had, as of Michaelmas Term, 1818, recovered a judgment against Jonathan Horn, since deceased (the father of the respondent), in the court of Exchequer, for the sum of £1920, besides costs. That he had revived the same as of Easter Term, 1838, and was entitled to sue out an *elegit* thereon: and, after shewing the sum due for principal, interest, and costs, it further stated, that at the rendition of the said judgment, said Jonathan Horn was seized of the lands of Leighbeg, Straduff, the water-mills of Gallen, and a house in Gallen, with ten acres of land thereto attached, under leases for lives still subsisting; and that same are in the occupation of the tenants mentioned in the schedule annexed. That the gross rent of same is £407 19s. 6d. per annum, the head rent £243 1s. 1d., leaving a profit rent of £164 18s. 5d.

That petitioner also obtained two further judgments, one of Trinity Term, 1820, for £436 18s. 2d.; and the other of Easter Term, 1821, for £1171 18s., against said Jonathan Horn.

That by indenture of 1821, said Jonathan conveyed the said premises to petitioner, in mortgage, to secure said debts. That under said mortgage, petitioner, in the year 1822, entered into possession of said lands of Leighbeg, Straduff, and water-mills of Gallen, *part* of said mortgaged premises, and has since continued in possession thereof, but was not permitted to enter into possession of the residue. That a large arrear of head rent was due on said premises, and also prior judgments affecting same, and that the rents are insufficient to pay petitioner.

That Jonathan Horn died in 1827, leaving the respondent his son and heir.

That a creditor by judgment puisne to petitioner's first judgment, but prior to said mortgage, is about proceeding to obtain the appointment of a receiver over said lands.

Upon the foregoing statement, the conditional order was obtained.

The affidavit of Jane Horn, widow of said Jonathan, shewing cause against said order, stated that the lands of Leighbeg, in petition

A mortgagee in possession, having a collateral judgment duly revived, may, under the sheriffs' act, have a receiver extended over the freehold in his own possession, subject, however, to an account of the rents, &c. received, or which, without wilful default, might have been received out of the premises during the period of possession under the mortgage.

If a petitioner, in his petition and verifying affidavit for a receiver under the sheriffs' act, omits a material fact within his knowledge, and the respondent or a third person comes in to shew cause against the conditional order thus obtained, and shews to the court the facts withheld by the petitioner, though the cause may be disallowed, the petitioner must pay the costs of the application.



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mentioned, consist of 185 *acres*, and are in the occupation of the tenants named in the schedule, *so far as the same are set forth* ; but that the schedule has only set forth the tenants in occupation of 100 *acres*, and has also altogether omitted stating the tenants in occupation of the remaining 80 *acres*, or thereabouts, of said land, as well as the annual value of same ; and that said 80 *acres* are in occupation of Francis Adams (petitioner's son), under a demise by the petitioner. That the only part of the mortgaged premises, into the possession of which petitioner has not entered, is a part in which the interest of said Jonathan Horn is no longer subsisting. That the respondent is a minor of the age of 18 years, and that deponent had repeatedly called on petitioner to account for the rents of said lands ; and that, on a fair account, the petitioner would be found to be overpaid.

Mr. *Litton*, Q. C., contended that, upon this state of facts, there were two grounds upon which this order should not be made absolute :—first, that it is the case of a mortgagee, who has been several years in possession, seeking a receiver over his own possession. As to this point, he relied on *Clarke v. Fisher*(a), where the late Master of the Rolls refused to extend a receiver under this act, on a judgment collateral to a mortgage, where there was a suit pending for a foreclosure of that mortgage. Also, *Smith v. Hanley*(b), where this court refused to grant a receiver on the petition of a judgment creditor who had obtained possession of a moiety under an *elegit*. This is an attempt to shake off the responsibility which attaches to him as a mortgagee in possession.—[MASTER OF THE ROLLS. I do not see how he can get rid of his liability to account, as mortgagee in possession, for the period during which he was in possession, by getting a receiver now.]—And secondly, that the petitioner has withheld from the court the full value of the respondent's premises, which he could not pretend ignorance of, as it appears the parts omitted are in his own occupation.

Messrs. *Miller* Q.C., and *O'Hara*, for the petitioner, relied on the right which the petitioner clearly had, under the statute, to a receiver ; his judgment having been revived, and he being now in a condition to issue an *elegit* thereon. They cited the case of *Hudson v. Williams* (c), to shew that the court of Exchequer would grant a receiver where a party had proceeded by *elegit*, provided he consented to waive his costs at law.

They also cited the case of *Allen v. Allen*(d), in which this court made an order for a receiver under this act, at the instance of a creditor by judgment collateral to a mortgage, although he had filed his bill for a foreclosure.

(a) 4 Law Rec. N. S. 149.  
(c) 4 Law Rec. 126.

(b) 4 Law Rec. N. S. 217.  
(d) 4 Law Rec. 131.

Mr. *E. M. Kelly*, in reply, admitted the right of a mortgagee to pursue divers, but not *identical* remedies at the same time, which would be found to distinguish the cases of *Clarke v. Fisher*, and *Allen v. Allen*. This latter case was an application on behalf of a mortgagee having a judgment of May, 1831, whose mortgage deed bore date in October, 1833, and who had filed his bill for a foreclosure, but was precluded from the benefit of having a receiver in the *cause*, by the fact of a creditor, by judgment of October, 1832, intervening between his judgment and mortgage, having actually gotten possession of a moiety of the estate under an *elegit*. Here the petitioner is, and has been for many years, in possession, and the court will therefore say in the language of the cases, that this "is a wanton and unnecessary proceeding" on the part of the creditor, when he is already in possession of the only advantage to be gained by it.

At all events the court will not make this order absolute, without obliging the mortgagee to account for the rents and profits during the period he has been in possession; and as he has been guilty of suppression he should pay us the costs of appearing on this motion.

His HONOR said he would look into the authorities and the affidavits, and make such an order as the nature of the case required.

*Saturday, 1st December.*

This day His HONOR made the following order in this matter :—

Disallow the cause shewn against conditional order of the 16th June, 1838, upon the terms hereinafter mentioned; and let the receiver ordered be appointed not only over the lands in the schedule to the petition in this matter, but also over all the lands mentioned in the indenture bearing date 21st May, 1821, mentioned in the affidavit of Jane Horn; and the petitioner, by his counsel consenting thereto, refer it to the Master to take an account of the sum received by the petitioner or which without his wilful default he might have received out of the several lands in the said deed of 21st May, 1821, and of the sum due to the petitioner on the foot of the judgment in the petition mentioned, for principal, interest and costs, after all just credits and allowances; and let the Master strike a balance after debiting the petitioner with the sum received, or which he might have received as aforesaid; and let the petitioner pay to the said Jane Horn the sum of £6, as and for appearing on this motion, the petitioner not having by his petition disclosed to the court the fact, that part of the premises mentioned in said deed of 21st May, 1821, are not included in the schedule to the petition in this matter.

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*Wednesday, 28th November.*

**SHERIFF—NEGLIGENCE OF—SUMMARY APPLICATION  
AGAINST.**

**In re COMYNS, Minors.**

This court will on motion, order a sheriff to pay in such sum of money as it appears has been lost, in consequence of his refusing or neglecting to execute with due diligence, an attachment issued out of this court and directed to him.—  
Attendance at Quarter Sessions where the chairman threatened to fine the Sheriff for absence will not be admitted as any excuse for delaying to execute the process of this court.

[As the judgment of the Master of the Rolls, in this case, fully states the facts, it is deemed unnecessary to give the previous discussion on the motion, which chiefly concerned the conflicting statements of the affidavits.]

On this day his Honor gave his judgment in the matter as follows :—

This is an application on behalf of Denis Burke, the sub-sheriff of the county of Galway, to shew cause against a conditional order, requiring him to pay into court the sum of £185, on the ground that he had not proceeded, with due diligence, to arrest Henry Paul Comyns, who, as was alleged, had improperly possessed himself of that sum, (being the property of the minors), and against whom the court had issued an attachment on the 5th of April last.

Numerous affidavits have been filed on both sides. On the one side it is stated, that the writ of attachment was delivered to the sheriff on the 6th of April, and with it, a letter addressed to him by Mr. Fitzpatrick, the solicitor for the minors, calling upon him immediately to execute the attachment, as otherwise, for the reasons stated in the letter, the money would be lost to the minors. On the other hand, the sub-sheriff denies having received any such letter from Mr. Fitzpatrick. But it appears that on the 7th of April, the day after Mr. Fitzpatrick's letter is said to have been delivered, the sub-sheriff wrote to Mr. Fitzpatrick, excusing himself, on the ground of the wetness of the weather, and the pressure of other official duty, for not having already executed the attachment, and promising to do his duty "*on Thursday or Friday next.*"—On looking at this letter from the sub-sheriff, I have no doubt upon my mind, that it was sent in answer to that which Mr. Fitzpatrick had written, and the receipt of which the sub-sheriff must have forgotten. I must therefore treat this letter as a reply, and nothing else than a reply to the letter of Mr. Fitzpatrick.

It appears from the affidavits, that shortly after this communication of the 7th of April, the sub-sheriff went to Ballinasloe, where the Quarter Sessions were then about to be held, and that he was followed thither by Mr. Fitzpatrick, who caused several notices to be served upon him, stating that the money would be lost if the attachment was not immediately executed. The sub-sheriff again pleaded an excuse, but offered to give a special warrant. Ultimately, the writ remained unexecuted.

The Sub-sheriff rests his defence on this ; that he was personally attending in the Assistant Barrister's court, and could not leave it to execute the attachment. If such an excuse as this were to be tolerated, there would be an end to the execution of the process of the superior courts. Under the extended civil bill jurisdiction, the sittings of the Assistant Barrister have been so extended, as to take in a considerable portion of the year ; and I could not allow any such excuse, as that attendance upon the Assistant Barrister prevented the Sheriff from performing the duty which he owed to the higher courts. If the Sub-sheriff must attend in the civil bill court, then during the time of such attendance, the High Sheriff must do his duty and execute the process and orders issuing from the superior courts. But it is said, that the Assistant Barrister in the present case, threatened to fine the Sub-sheriff £100, if he left the court :— Now, I am convinced, that if the circumstances of the case had been explained to the Assistant Barrister, he would have permitted the Sheriff to proceed in the discharge of his duty ; for all that the Assistant Barrister can require is, that some person shall be in attendance who represents the Sheriff.

The present application is further resisted, on two grounds, first, it is said that there is no evidence to shew that Henry Paul Comyns could have been arrested ; and it is insisted, on the part of the sub-sheriff, that he could not :—and secondly, that even supposing the sub sheriff neglected to execute the attachment, I ought to leave the party aggrieved to their remedy by action ; and that I have no power to interfere. In the course of my own experience, I have known it to be the constant practice to call on the sheriff to pay over money which has been lost by his default or negligence. I have, however, looked into the authorities on the subject.—[His Honor then referred to *Hearly v. Earl of Pembroke*(a); *broke*(a) ; *Crofton v. Meredith* (b) ; *Anon.* (c) ; *Collard v. Hare* (d).]— Although, in the case in 5th *Simon*, the court did not oblige the sheriff to pay, it was not for want of jurisdiction, as to which the case in *Carey* is a distinct authority. I have not the least doubt that I have jurisdiction to order the sheriff to pay the money ; and I would certainly have done so, if, on the facts as stated, I was satisfied that the arrest could have been made. As to this, though my impression is strongly against the sheriff, I have some doubt. The course, therefore, which I shall adopt is, to order that an issue be tried to investigate that fact, and I will take care that the issue shall be had in the county of the city of Dublin, where there can be no undue interference with the selection of the jury. I must add, that Mr. Fitzpatrick deserves much credit for the diligent manner in which he has discharged his duty towards his young clients, whose circumstances

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Minors.(a) 1 *Carey's Rep.* 62 ; *ibid.* 109.(b) *Wyatt's Practical Reg.* 394(c) 11 *Ves.* 170 ; *Harrison C. P.* 118.(d) 5 *Sim.* 10.

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are, as it appears, very limited indeed, and who are not in a condition to protect themselves. I would be very glad if I could order the costs as between them and their solicitor, to be paid out of the suitor's fund; and if their counsel can shew me any precedent or authority for so doing, I will do so.

The order is as follows:—

Whereas the petitioner, D. Burke, has, by his counsel, desired that the question, as to his neglect in not having arrested the said Henry Paul Comyns, in the petition named, under the attachment which issued in this matter, should be submitted to a jury—Let the guardian of the fortune of the minors (T. Goold, Esq.) be at liberty forthwith to commence a feigned action in her Majesty's Court of Common Pleas, against the said D. Burke, to which the said D. Burke is forthwith to appear *gratis*, plead the general issue, and admit all matters of form, so that a trial may be had between said parties by a special jury of the county of the city of Dublin in next Hilary Term; and let the sheriffs of the city of Dublin lay before T. Goold, Esq., the Master in this matter, the grand panel of the jurors of said county of the city of Dublin, and he is thereout to name forty-eight of said jurors; and thereupon each party is to be at liberty to strike out twelve, and the remaining twenty-four are to be the jury for the trial of the issue following, that is to say, to try and inquire "Whether the said D. Burke could, at any time after the delivery of the writ of attachment in this matter to him, on the 6th of April last, have arrested H. P. Comyn, in the said writ, under and by virtue thereof, or not?"—the guardian of the minors to be plaintiff on the trial of such issue, and D. Burke to be defendant, and reserve further order and consideration of the costs of this motion until after the said trial shall be had, in case the said guardian shall proceed to trial on such issue before the first day of next Easter Term; and in case he shall not do so, let the cause now shewn by the said D. Burke be allowed, without costs.

## EQUITY EXCHEQUER.

*Friday, November 30th, 1838.*

## PRACTICE—CONDITIONAL ORDER—SHEWING CAUSE.

LLOYD, Petitioner; ARMSTRONG, Respondent.

Mr JOHN BROOKE, Q. C. for the petitioner, moved to make absolute the conditional order of the — day of June, 1838, notwithstanding the affidavit filed as cause.

Practice as to  
shewing cause  
against Condi-  
tional Orders.

Mr. C. H. Walker, for the respondent, objected to the motion, as having been brought forward too late, notice of it not having been given within the 10 sitting days prescribed by the 113th Rule of Court, bearing date the 24th of May, 1822(a).

The affidavit to shew cause was filed by the respondent on the 22d of June last, but notice of the present application was not served until the 23d of November, instant; the petitioner was, therefore, out of court.

Mr. Brooke cited the case of *Barret v. Meyrick*, decided by this court in June, 1836, with a note of which he had been furnished by Mr. Jones. In that case PENNEFATHER, B. allowed a party to come in and make a conditional order absolute, notwithstanding the expiration of the 10 days allowed for serving notice of such application.

After some discussion, as to the existing practice of shewing cause against conditional orders, it was announced by the COURT, that, for the future, the terms of the General Order, bearing date the 24th of May, 1822, should be strictly adhered to.

*Saturday, December 1st, 1838.*

On this day, PENNEFATHER, B., after referring to the Order of the 24th of May, 1822, and to the Order of the 29th of November, 1830, on the Law side of the court(b), observed, that the latter Order had been made, to enable the Law Taxing Officers to tax the costs of filing affidavits as cause; but that, on the Equity side of the court, the Officer had always taxed under the General Order of the 24th May, 1822, without any special order for the purpose.

(a) See this Rule, *Lowry's Eq. Ex. Rules*, p. 140, and *infra*, Note.

(b) See this Order in the Note, *post*.

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The Court, however, (his Lordship proceeded to state,) being of opinion that some alteration should be made in the practice, directed that the following words should be added to the Order on the Law side, bearing date the 29th of November, 1830:—"And upon the entry of such side-bar rule, and not before, the cause shall be deemed to be allowed."—The Order, when so amended to be adopted on the Equity side of the court.\*

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\* NOTE.—*The following are the Rules by which the practice as to shewing cause against conditional orders is regulated, both on the Law and Equity side of the court.*

"Friday, 24th May, 1822."

"GENERAL ORDER."

"It is ordered by the court, that, from and after the first day of *Trinity* term next, in all cases where a conditional order for any purpose shall be obtained, and an affidavit or affidavits in answer shall be duly and in due time filed for shewing cause, and notice thereof duly given, such affidavit or affidavits in answer, and notice, shall be good cause against making such conditional order absolute, unless the party obtaining such conditional order shall, within ten sitting days after the filing the affidavit or affidavits in answer, and due notice thereof given, give notice of applying to the court to make the conditional order, or some part thereof absolute, and move such notice according to the course of the court; and, if such notice be not given within the time aforesaid, the party on whose behalf the affidavit or affidavits, in answer, have or has been filed, shall have his costs of making and filing such affidavit or affidavits, and of giving notice thereof, provided he have been served with the conditional order.

"This rule not to extend to conditional orders for setting aside verdicts."

"By the Court."

The practice, on both sides of the court, was governed by this rule:—

On the Equity side, the Officer taxed, as a matter of course, the costs of filing affidavits as cause, and giving notice thereof, under the above general rule, without requiring any order for that purpose in each particular case: but in consequence of the Law-Taxing Officers having refused to tax such costs under the General Rule, without a special order, authorising them to do so, in each case, the following General Order was made on the Law side of the court:—

"Monday, 29th Nov. 1830."

"It is further ordered and declared, in conformity with the General Order of 24th May, 1822, that whenever a party served with a conditional order shall file an affidavit or affidavits, as cause against such order, and shall give notice thereof, and the party obtaining such conditional order shall not move within the time prescribed by the said General Order to make the conditional order absolute,—the party filing such affidavit or affidavits shall be entitled to have a side-bar rule entered, allowing the cause shewn as an authority for taxing the costs of filing such affi-

Wednesday, December 5th.

# APPEAL—PROCESS TO ENFORCE ANSWER.

The ATTORNEY-GENERAL v. CONROY and another.

Mr. A. J. MALEY, on the part of the defendants, moved to stay the entering of process, pending an appeal to the House of Lords, from a decretal order of this court, overruling exceptions taken by the defendants, to the Remembrancer's report of a short answer.

The information in this case was filed for an account of duties on spirits, the payment of which was alleged to have been evaded by the defendants, who were distillers. The defendants answered a part only

The entry of process to enforce an answer restrained pending an appeal to the House of Lords, where answering would render an appeal useless.

"davit or affidavits, and giving notice thereof—pursuant to the said General Order, and such costs shall be taxed accordingly."

"By the Court."

In pursuance of the last mentioned order, the following side-bar rule was entered:—

"On motion of Mr. — (plaintiff's or defendant's attorney, as the case may be,) and on reading the conditional order of the — day of —, served on — (plaintiff or defendant,) and — (plaintiff's or defendant's) notice of the filing of affidavits as cause against said conditional order, It is Ordered by the court, that the cause shewn against said conditional order be allowed, and — to have the costs of shewing cause against said conditional order, without further motion."

The practice on the Law side of the court seems to have been settled by the order of the 29th of November, 1830; as, until the entry of the above side-bar rule, a party was not considered as precluded from coming in to make absolute a conditional order, not-

withstanding the expiration of the 10 sitting days prescribed by the order of the 24th of May, 1822.

From the absence of a corresponding order on the Equity side of the court, the practice there seems to have been variable:—the court in some instances allowing parties to come in and make conditional orders absolute, after the termination of the ten days limited by the General Order of 1822, for giving notice of such applications; see *Burton v. Eager*. 1 Law Rec. N.S. 182; *In re Ryan*, 5 ditto, 198; and *Barrett v. Meyrick*, cited by Mr. Brooke, *supra*; whilst, in other instances, a more strict interpretation of the order of 1822 appears to have been adopted.

The practice on both sides of the court is now, however, finally settled.

The following is the New General Rule of the Equity Exchequer.

"Wednesday, 5th Dec. 1838.

"It is this day Ordered by the court, in conformity with the General Order of the 25th May, 1822, that whenever a party served with a conditional order shall file an affidavit or affidavits,



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of the information, and insisted by their answers, that they were not bound to answer the remainder: to this answer exceptions were taken by the Attorney-General, and allowed by the Remembrancer, to whose report the defendants took exceptions, which were overruled by the court (a.)

The affidavit, on which the present application was grounded, stated, that immediately after the overruling of the exceptions, the defendants had their petition of appeal to the House of Lords prepared, and forwarded for presentation; but, before they had time to comply with the standing orders of the House of Lords, respecting the mode of giving security for costs, parliament was prorogued.

Counsel cited *Wood v. Milner* (b), and *The King of Spain v. Machado* (c), in support of the application.

Mr. Tomb, for the Attorney-General, opposed it, on the ground of the defendants not having used due diligence in the prosecution of the appeal, and submitted that, at all events, the court ought to put the defendants under terms to give security to abide the decree.

The COURT granted the order staying the entering of process until the 12th of February next, with liberty to the Attorney-General, if the appeal should not be presented before that day, to enter process from the beginning.

(a) See a Report of this case, 6 Law Rec. N. S. 281.

(b) 1 Jac & Walk. 636.

(c) 4 Russell, 560.

"as cause against such order, and  
"shall give notice thereof, and  
"the party obtaining such conditional order shall not move within  
"the time prescribed by such General Order, to make the conditional order absolute, the party  
"filing such affidavit or affidavits  
"shall be entitled to have a side-bar rule entered, allowing the  
"cause shewn, as an authority for

"taxing the costs of filing such  
"affidavit or affidavits, and giving  
"notice thereof, pursuant to said  
"General Order; and such costs  
"shall be taxed accordingly:—and  
"upon the entering such side bar  
"rule, and not before, the cause  
"shall be decreed to be allowed."

"By the Court."

"GERALD TENCH,"  
"Register."

## CHANCERY.

*Saturday, November 24th, 1838.*

## TRUSTEE AND CESTUI QUE TRUST—PRACTICE—BILL.

## ARDILL v. SAVAGE.

The bill in this cause was filed by a trustee in a marriage settlement, against his *cestui que trusts*, and his co-trustees, in order to be discharged from the trusts, and to be re-paid certain sums which he had disbursed in the execution of the trusts. The question discussed at the hearing was, whether the plaintiff could compel the *cestui que trusts* to nominate a new trustee, and discharge the plaintiff from the trusts, which had become burthensome.

The settlement was dated 16th August, 1833, and was made on the intermarriage of the defendants, Francis Savage, and Eliza, his wife. By that deed (amongst other provisions), a policy of insurance on the life of the husband was assigned to the trustees of the settlement, Ardill, the plaintiff, and Alexander Arthur, one of the defendants, on trust, after the decease of the husband, to pay the interest to the wife for life, and, after her decease, to pay the principal to the issue of the marriage.

The settlement contained a clause, which provided, that if the trustees, or either of them, should die, *or be desirous of being discharged* from the trusts, or decline, or become incapable to act therein, or should reside, or be about to reside abroad, before the trusts should be fully executed, that then it should be lawful for the said Francis Savage, and Eliza, during their joint lives, and afterwards for the survivor of them, and after the death of the survivor, for the surviving or continuing trustee, with the consent of the guardian of the children, if any, or if none, of his own authority, by deed, to nominate, substitute, or appoint a person to be trustee, instead of the trustee so dying, declining to act, &c. Another clause empowered the trustees to reimburse themselves their expenses, out of any funds in their hands. And in order to provide for the payment of the premiums on the said policy of insurance, a rent-charge of £58. 10s. a-year was granted to a third trustee, Robert Arthur, and a term created to secure it.

Mr. Savage, the husband in the settlement, became embarrassed. A bill was filed against him in the Exchequer, by persons claiming incumbrances, which had been charged on his property previous to the marriage. A receiver was appointed, and Mr. Savage became unable to advance the annual premium on the policy of insurance

Whether a trustee who has accepted the trust, and committed no breach, can, by filing a bill, get discharged, if no other fit person can be found to act, and *cestui que trust* will not consent to his discharge?

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Under these circumstances, he wrote a letter to the present plaintiff, stating that he was unable to pay the premium, and giving him to understand, that he, the trustee, would be held responsible, if the insurance were permitted to drop. The plaintiff, thus admonished, applied to Mr. Robert Arthur, the trustee of the rent-charge, but he declined having any thing to do with it, and said his name had been inserted as trustee without his consent. The plaintiff also applied to the receiver in the Exchequer cause, who was prevailed on to pay the premium for one year; but the plaintiff had since been obliged to pay one premium of £58. 10s. out of his own pocket.

The defence made was, that, in fact, Mr. and Mrs. Savage could not get any proper person to act in the trusts, the fund having become embarrassed, not in consequence of their misconduct, but by reason of charges created, prior to the marriage, by the grandfather of Mr. Savage.

Mr. Warren, Q. C., for the plaintiffs, cited *Hamilton v. Fry (a)*, in which Lord Manners said, it was the habit in Ireland for trustees to file bills for their own removal, but that there was a difference between English and Irish practice in respect to costs; but that was where the *cestui que trust* was not in default. In a recent case in England, *Coventry v. Coventry (b)*, where a trustee was desirous of retiring, in consequence of the acts of the tenant for life, the relief was granted, with costs, to be paid out of the interest of the tenant for life; which, from Lord Langdale's observations, is the rule where the party misconducts himself. The case here is stronger. There is an express power given to change the trustee, when unwilling to act. A deed, appointing a new trustee, had been prepared and engrossed, and one Edward Ruthven had been named as a new trustee, with the approbation of Mr. and Mrs. Savage; but circumstances having afterwards transpired which induced them to consider Edward Ruthven an unfit person to be appointed, they refused either to execute the deed, or nominate another person in his room.

Sergeant Curry and Mr. Hutton, for the defendants.

The plaintiff cannot be removed without the consent of Mr. and Mrs. Savage, and without appointing a proper person. There is nothing in

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(a) 2 *Moll.* 458. In that case, "It is done in Ireland, but trustee Lord Manners said: "In England, "must do it at his own expense; "a trustee, after he has acted, is "he must pay the costs of the suit; "never removed at his own desire.

(b) Keen, 758.

the deed compulsory on them to appoint a new trustee. Mr. and Mrs. Savage are unable to find a proper person to undertake the trust. A Mr. Wm. Lee was proposed by the plaintiff, but it turned out that he was an attorney's clerk, without any property whatever, and Mr. Savage could not consent to his being appointed. Two authorities have been cited. As to *Hamilton v. Fry* (c), there are no authorities to sustain Lord Mansfield's dictum in that case as to Irish practice. As to *Coventry v. Coventry* (d), the report does not state the nature of the settlement, and the appointment of a new trustee was not opposed by any of the defendants. Besides, in that case, the bill was filed on the ground of misconduct by the tenant for life since the settlement. No such facts exist here. Mr. Savage paid the premium as long as he remained in receipt of his rents. The incumbrances in the Exchequer cause were not created by Mr. Savage, but by his grandfather, and these very incumbrances are recited in the settlement of which the plaintiff is trustee, and to which he is a party. He undertook the trusts with full knowledge. As to the £58. 10s., it is a mere personal demand against Mr. Savage, recoverable at law.

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Mr. W. Brooke, for the plaintiffs, in reply.

A very high authority says, that where a trustee is not accountable, he may file a bill to be removed. *Anon. v. Osborne* (e). The ground there was, that the trustee had never acted. The Chancellor doubted whether it could be done *without a suit*, but directed a reference to ascertain whether the trustee remained accountable, and, if not, the Master to settle a release. That case shews, that there is no doubt it may be done by a suit. As to the difference between this case and the case of *Coventry v. Coventry*, the difference is in our favour. The difficulties of the trustees in this case are greater. The tenant for life has neglected to keep down the interest on the incumbrances, and thereby caused the appointment of the receiver. Is it to be contended that the trustee is to go on paying £58. 10s. a-year out of his own pocket? In *Coventry v. Coventry*, the prayer of the bill was granted, and there was a reference to the Master to appoint a new trustee.

LORD CHANCELLOR.—What can be done in the affair, if no one will act as trustee? Is the Master to advertise for a trustee? I must see some practical result from a reference before I direct one. The case is a difficult one. Mr. Ardill is in the position of a person who has committed an imprudence; he has become an executing party to this deed of trust. I do not at present see how I can relieve him from the consequences, unless some other person can be found to undertake the trust. Both the parties may find great difficulty in finding a proper person who will

(c) 2 Moll; 458.

(d) Keen, 756.

(e) 6 Ves. 455.

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be willing to act, under the adverse circumstances of the trust. I will not say that Mr. Savage is not justified in saying that he will not consent to a mere nominal person being appointed as a trustee. I will let the cause stand for the present, in order that the parties may, in the mean time, apply, in the Exchequer cause, for an order on the receiver to pay the annual premium on the policy of insurance.

The cause stood over accordingly.

Tuesday, 27th November.

### PRACTICE—MOTION TO VARY DECREE.

CONNELL v. FRITH.

Decree slightly varied on motion in a matter of costs where the merits were very clear.

This was a motion in the cause of *Catherine Connell* and *Ryland Byron*, against *Mary Frith* and others. The parties plaintiffs and defendants were jointly entitled to the funds in the cause as legatees. A decree to account had been pronounced, and by the final decree, on further directions on the 7th May, 1838, the fund was distributed between them according to their respective rights as reported, and it was ordered (among other things) "that all parties should be entitled to their costs, necessarily and properly incurred by them in *this cause*."

Mr. *Keatinge* Q. C., and Mr. *M'Kenna*, now moved on behalf of the plaintiffs, that the Master, in taxing the plaintiff's costs under the above decree, should be at liberty to allow "all costs properly and necessarily incurred in the realizing of the sum of £940. 9s. 7d., being the subject matter of the cause, and reported due to the executors of the late Mr. *Ryland* in a certain cause of *Saunders v. Saunders*, and as such, that he do allow the costs of filing the bill in a certain cause of *Henry Connell v. Frith* and *Spencer*, and also the costs of proving the charge "in the said cause of *Saunders v. Saunders*." \*

Mr. *Keatinge* Q. C., and Mr. *M'Kenna* for the plaintiffs, rested the motion entirely on the extreme hardship of the case. It had been by the exertions of the plaintiff *Catherine Connell* and her late husband *Henry Connell*, that the funds now to be divided were realized. The costs incurred in the case of *Saunders v. Saunders*, and *Henry Connell*

\* This motion was previously made before his Honor the Master of the Rolls, who, though he thought it a very hard case on the plaintiffs, considered it a motion to vary a decree and an application which could not be granted; but as it was the Lord Chancellor's decree which was sought to be affected by the motion, he gave

*v. Frith and Spencer* were unavoidably and meritoriously incurred in realizing the fund which is now to be divided in this cause. And now, because the minutes of the decree were drawn up so as apparently to confine the plaintiff's costs to the costs in this cause, the parties who were to profit by their exertions refused to allow them the costs, necessarily and fairly incurred in those suits. Master Connor in taxing the costs had strongly pressed the defendants to consent to the taxation being made as sought, and expressed an opinion that the court would make an order to that effect, if applied to, although he felt a difficulty in doing so, on his own responsibility without such an order. The intention of the decree was clearly to give the costs "properly and necessarily incurred."

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Mr. *Monahan contra*.—This is nothing more nor less than a motion to alter the decree : and besides, the costs incurred in the cause of *Henry Connell v. Frith and Spencer* were wholly unnecessary, as afterwards appeared by their abandoning that suit, and proving the demand under the decree in *Saunders v. Saunders*. The decree only gives them the costs incurred in this cause.—[LORD CHANCELLOR. If these costs had been asked at the hearing, could I have refused? Can I drive the parties to a re-hearing?—The proceedings in the cause of *Henry Connell v. Frith and Spencer* were wholly unnecessary.

LORD CHANCELLOR.—Whatever costs were necessarily and properly incurred, in realizing the fund, ought to be allowed. I cannot drive the party to a re hearing.

The order was as follows :—

Let the Master, in taxing the plaintiff's costs under the decree in this cause, be at liberty to allow all costs properly and necessarily incurred by them in proving the charge under the decree in the cause in which Henry Owen Saunders was plaintiff, and Richard Saunders and others were defendants, and also the costs of filing the bill of the 13th of Feb., 1832, in which Henry Connell, and said Catherine Connell, and Ryland Byron a minor, were plaintiffs, and James Frith, and said Henry Owen Saunders and others were defendants.—27th November, 1838, *Chancery Motion Book, Fol. 193*.

leave to the parties to move it before his Lordship, if they thought fit so to do.—See the case of *Atkin v. Lord Doneraile*, 3 Law Rec. N. S. 13, Mich. 1834, where the notes of a decree were amended with respect to the costs of suit.—See *Coleman v. Sarrell*, 2 Cox 206, where an application of

this nature was refused, though made on behalf of a mere trustee, where costs had been omitted in the decree, and it is observed with reference to this case, that it operated very severely, as a *re-hearing* as to costs is not allowed.—2 Mad. Equity, 637.

*Tuesday, November 27th, 1838.*

## JUDGMENT—RE-DOCKETTING ACT.

MARTIN v. D'ARCY.

The second section of the act for re-docketting judgments, 9 Geo. 4, c. 35, was intended for the protection of purchasers of freehold property for valuable consideration, whether their purchases were made before or since the passing of that act.\*

In the year 1810, John D'Arcy executed a mortgage of part of his estate to Patrick Martin, to secure a sum of about £10,000, and also executed a bond and warrant of attorney to confess judgment thereon, as a collateral security.

Judgment was accordingly entered on that bond in the year 1810.

In the year 1811, the same John D'Arcy executed a further mortgage to one Blake. This latter mortgage included several denominations of lands, and amongst them the lands comprised in Martin's mortgage.

Blake subsequently filed a bill of foreclosure, and made Martin a party to the suit; but Blake refusing to redeem Martin's incumbrance, his bill was dismissed with costs as to Martin.

A bill was afterwards filed by Martin, to raise the mortgage of 1810, and a decree for a sale obtained, under which all the lands

\* This statute passed the 27th June, 1828. The parts which were referred to in the argument were the three first sections. The first section relates to judgments recovered subsequent to 27th June, 1828; the second relates to judgments recovered between 27th June, 1808, and 27th June, 1828; the third relates to judgments recovered prior to 27th June, 1808. These three sections, with the preamble, are as follows:—

“Whereas great difficulties are frequently found to arise in making out title to freehold property in Ireland, by reason not only of the number of old outstanding judgments in the respective courts of King's Bench, Common Pleas, and Exchequer, in that part of the United Kingdom, appearing unsatisfied on record, though considerable numbers of the same have been actually paid off and discharged, but also by reason that in many cases the defendants in judgments entered in

“the said courts are not sufficiently described, so as to identify the persons against whom such judgments have been actually recovered, to the great impediment of the due transfer of such freehold property, and to the great disquiet of purchasers for valuable considerations; and it is expedient that a remedy be provided for the same.” Be it therefore enacted, that all judgments which shall, after the passing of this act, be entered or recovered in his Majesty's courts of King's Bench, Common Pleas, or Exchequer, in Ireland, shall, after the expiration of twenty years from the date of the entry or recovery thereof, be null and void as against purchasers for valuable consideration, of any lands, tenements or hereditaments in Ireland, unless the same shall be duly revived, according to the course and practice of the said respective courts, or re-docketed in manner hereinafter directed, and the revival or re-docketing thereof

comprised in the mortgage deed of 1810 were sold. However, the produce thus realized proved insufficient to discharge the whole of Martin's debt, with interest and costs, and Martin consequently still remained a creditor to the amount of about £1000.

Blake afterwards, in the suit which he had instituted on foot of the mortgage of 1811, obtained a decree against D'Arcy, for a sale of all the remainder of the lands comprised in that mortgage; but no sale took place under that decree, D'Arcy having taken steps to raise money for the purpose of paying off the sum decreed.

Accordingly, in December, 1836, D'Arcy borrowed, from Messrs. Eyres, of London, a sum of about £20,000, to be applied in paying off the sum due on foot of the decree obtained by Blake; and in order to secure this advance, D'Arcy executed a further mortgage, dated in 1836, to Messrs. Eyres, and by that deed D'Arcy covenanted that Messrs. Eyres should obtain an assignment of the mortgage of 1811, and of the decree obtained by Blake on foot thereof, and the £20,000 was deposited in the hands of one Norris, on trust, to be applied in discharge of the sum due on foot of that decree, and other prior incumbrances affecting the mortgaged premises.

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entered in the manner hereinafter provided, within 20 years next before the execution of the conveyance, settlement, mortgage, lease, or other deed or instrument, vesting or transferring the legal or equitable right, title, estate, or interest in or to such purchaser for valuable consideration.

II. And be it further enacted, that all judgments which shall have been entered or recovered in his Majesty's courts of King's Bench, Common Pleas, or Exchequer, in Ireland, within 20 years next before the passing of this act, shall, after the expiration of 20 years from the entry or recovery thereof, be null and void, as against purchasers for valuable consideration, of any lands, tenements, or hereditaments in Ireland, unless the same be duly revived according to the course and practice of the said respective courts, or re-docketed in manner hereinafter directed, and the revival or re-docketing thereof be entered in the manner hereinafter mentioned, within twenty years next before the execution of the

conveyance, settlement, mortgage, lease, or other deed or instrument vesting or transferring the legal or equitable right, title, estate, or interest, in or to such purchaser for valuable consideration, or within five years from the passing of this act.

III. And be it further enacted, that all judgments which shall have been entered or recovered in his Majesty's courts of King's Bench, Common Pleas, or Exchequer, in Ireland, 20 years or upwards next before the passing of this act, shall be null and void, as against all purchasers for valuable consideration, of any lands, tenements, or hereditaments in Ireland, whether their purchases shall have been made before or after the passing of this act, unless the same shall be duly revived, according to the course and practice of the said respective courts, or re-docketed in manner hereinafter directed, and the revival or re-docketing thereof be entered in the manner hereinafter mentioned, within five years from the passing of this act.



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An application was subsequently made to the court, in which Norris, D'Arcy, and the Messrs. Eyres all joined, and they obtained a reference to Master Connor, to ascertain the sum now due on foot of Blake's decree, for principal, interest, and costs; and, on obtaining this order, Norris paid the money into court.

Master Connor made his report, but before the money was drawn out, C. B. Martin, (now personal representative of Patrick Martin who had died) applied at the Rolls for liberty to come in under the decree in *Blake v. D'Arcy*, and file a charge on foot of his judgment of 1810, for the £1000, still remaining unpaid, as before mentioned.

This application was opposed by Messrs. Eyres and Blake, who insisted, that, as the judgment obtained in 1810, as a collateral security to the mortgage, had not been re-docketed, pursuant to the provisions of the 9 G. 4, c. 35, it was barred as against purchasers for valuable consideration.

The Master of the Rolls made an order, giving Martin liberty to file his charge, but without prejudice to the parties availing themselves of the re-docketting act, as a bar.

In the mean time, Messrs. Eyres obtained an assignment of Blake's mortgage—the money to discharge Blake's demand having been paid into court, as before mentioned: and accordingly, on the investigation in the office, Messrs. Eyres relied both on Blake's mortgage, dated in 1811, and the assignment thereof, which had been executed pending C. B. Martin's last mentioned proceedings.

Master Connor, however, refused to permit Messrs. Eyres to make any proof, before him, of the mortgage to themselves in 1836, the cause having no relation to that mortgage: but he allowed them to avail themselves of the mortgage of 1811, and the assignment thereof to them, which they had lately obtained. Master Connor was, however, of opinion, that Martin's judgment, having been obtained in 1810, was entitled to priority as against the mortgage of 1811; conceiving that the latter was not such a purchase as was contemplated by the 2d section of the statute, which, in Master Connor's opinion, only extended to purchases made after the passing of the act; and he reported accordingly.

Messrs. Eyres applied at the Rolls, to set this report aside, relying both on the mortgage of 1811 to Blake, as a purchase *before* the statute, and on the mortgage executed to themselves, as a purchase *after* the statute; but his HONOR, concurring with Master Connor in his view of the case, refused the motion, with costs.

In the mean time, the point was decided the other way by the LORD CHANCELLOR, in the case of *Knox v. Kelly*, on exceptions to a report by Master Townsend, who had taken an opposite view of the 2d section of the statute from that of Master Connor. The LORD CHANCELLOR

held, that the 2d section of the statute applied as well to purchases made before the act as after.

The parties, therefore, claiming under Blake's mortgage, now appealed to the LORD CHANCELLOR, from His HONOR's order, citing *Knox v. Kelly* as an authority.

On the facts being stated to the LORD CHANCELLOR, he adhered to the opinion he had expressed in *Knox v. Kelly*\*, that the 2d section of the act applied to purchases before the act; and reversed the Rolls' order.

The Rolls' order was accordingly reversed, without prejudice to the parties laying such other facts before the Master, when reviewing his report, as would take the case out of the operation of the statute.

\* The following is a note of the case referred to :—

JUDGMENT—RE-DOCKETTING ACT.

KNOX v. KELLY.

By deed, in the nature of a mortgage, dated 1st August, 1819, Patrick Kelly, being then seized of certain freehold estates in the county of Mayo, granted to Francis Knox two annuities of £300, and £400, the first to be payable during the life of the said Patrick Kelly, the grantor, and the second to commence after his decease, and to continue to be paid until a certain debt of £1896. 12s., due by Kelly to Knox, should be fully paid off, with interest and charges. And in order the better to secure the said annuities, the said Patrick Kelly, by the same deed, conveyed to Myles John O'Reilly, as a trustee for Knox, the said lands in the county of Mayo, and Francis Knox thereby covenanted, that so soon as the said debt, with interest and charges, should be paid, he would execute a re-conveyance.

The said Francis Knox died, having, by his will, appointed the said Myles John O'Reilly (the trustee in the above deed,) his executor.

A bill to carry the trusts of the will of the said Francis Knox into execution, and for an administration of his assets, was afterwards filed in this court by John Knox, claiming as a creditor of the said Francis Knox, deceased, against the said Myles John O'Reilly, as such executor.

Part of the assets of the deceased consisted of a considerable sum due on foot of the deed of 1st August, 1819.

Under the proceedings in that cause, the assets of Francis Knox were partly got in, and the produce applied, as far as it would go, in payment of several creditors of the deceased, but the sum due on foot of the deed of 1st August, 1819, remained outstanding, not having been called in, and several of the creditors of the deceased still remained unpaid, and amongst the latter was the said John Knox.

In order to get in the sum due on foot of the deed of 1st August, 1819, it was agreed between Myles John O'Reilly, the defendant in that cause, and the said John Knox, that Myles John O'Reilly, as trustee of that deed, and executor of Francis Knox, should execute an assignment to the said John Knox, so as to enable the latter to proceed

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The 2d section of the act for re-docketting judgments 9 G. 4, c. 35, was intended for the protection of purchasers of freehold property for valuable consideration, whether their purchases were made before or since the passing of the act.

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KNOX

v.

KELLY.

(ex rel.)

21st Feb.  
1834. Assign-  
ment of mort-  
gage by execu-  
tor.

Bill filed  
21st April  
1834.

Decree to  
account 16th  
April, 1836.

O'Dowd's  
judgment,  
Michaelmas,  
1811.

by bill in equity, in his own name, to call in the amount due on foot of the said deed.

Accordingly, a deed, dated 21st February, 1834, was entered into between the said Myles John O'Reilly and the said John Knox, which recited the deed of 1819, and the subsequent proceedings above mentioned, and that the said Myles John O'Reilly had agreed to assign the said mortgage of 1819 to the said John Knox, as being part of the assets of the said Francis Knox, and to enable him to proceed by bill in equity, or otherwise to call in the amount due thereon, for the purpose of applying the produce thereof amongst the unpaid creditors of the said Francis Knox, to the end that they might be paid according to their priorities, as far as such assets would extend. By this deed, the said Myles John O'Reilly, "for the considerations aforesaid,\* and for and "in consideration of 10s.," conveyed (by way of lease and release) the said lands in the county of Mayo, and all the said O'Reilly's interest therein to John Knox, in trust for the sole use of himself the said John Knox, and all the unpaid creditors of the said Francis Knox, according to their respective priorities. And the said Myles John O'Reilly thereby, also, as executor of the said Francis Knox, assigned to John Knox, the said two annuities of £300 and £400 chargeable on the said lands and all arrears thereof.

Accordingly, the bill in the present suit was filed on 21st April 1834, by the said John Knox, praying an account on foot of the said deed of 1st of August 1819, and the assignment of the 21st February, 1834, and also praying an account of prior incumbrances and a sale.

The several persons claiming incumbrances were made parties to suit, and amongst the rest, Thomas O'Dowd was made a party defendant, as claiming on foot of a judgment obtained in 1811, but the plaintiff by his bill submitted that the said judgment was barred by the re-docketting act, 9 G. 4, c. 35.

On the 16th April, 1836, the usual decree to account was pronounced, and it was referred to Master Townsend to *take an account* of the sum due to plaintiff for principal interest and costs, on foot of the deed 1st August, 1819, and the assignment thereof of 21st February, 1834, and also to take an account of prior incumbrances.

Under the above decree Thos. O'Dowd filed his charge, claiming £400 with interest and costs, on foot of a judgment obtained in *Michaelmas*, 1811, by Jas. O'Dowd, against Patrick Kelly, which by deed dated 28th July, 1823, duly enrolled on 13th June, 1825, had been assigned to said Thos. O'Dowd: who also, by his charge, stated that the said judgment was duly revived against the heir and tertenants of Patrick Kelly, as of *Hilary Term*, 1828, and duly *re docketted on the 5th May*, 1835; and further, that on the 26th March, 1832, he had filed a bill in the Equity Exchequer, to raise the said judgment out of the real and personal estate of the said Patrick Kelly, the costs of which proceeding he now also claimed in addition to his judgment.

The plaintiffs† by their discharge set forth, that by the provisions of the re-docketting act, 9 G. 4, c. 35, all judgments recovered within 20 years previous to the passing of the act (27th June, 1828) were void,

\* These were the words of the deed, and appeared to refer only to the recital setting forth the circumstances under which the deed was made.

† James Blake Knox, and W. Knox, executors of John Knox, who died after the filing of the bill of 21st April, 1834.

as against purchasers for valuable consideration, unless revived or re-docketed, and the revival or re-docketing thereof entered within 20 years next, before the execution of conveyance to such purchaser, or within 5 years from the passing of the act. And insisting that inasmuch as O'Dowd's judgment, obtained in 1811, was not re-docketed pursuant to the act, it was void, as against the plaintiffs who were executors of John Knox, who, under the deed of 21st February, 1834, was a purchaser for valuable consideration, of the lands in the pleadings, and they also insisted, that the costs incurred in the exceptions and suit on foot of the judgment must be postponed, for the same reason.

Master Townsend made his report, dated April, 1838, and reported £2890 due to the plaintiffs on foot of the deed of 1st August, 1819, and the assignment thereof of 22d February, 1834.

And as to O'Dowd, the said Master reported that the judgment was obtained in Michaelmas, 1811, against Patrick Kelly, and was duly assigned on 28th July, 1823, to the defendant Thomas O'Dowd, but found that under the provisions of the re-docketing act, the said judgment was null and void as against the plaintiffs, as executors of John Knox deceased, inasmuch as the said John Knox deceased was, under the deeds of 1st August, 1819, and 21st February, 1834, and under each of the said deeds, a purchaser for valuable consideration of the lands in the pleadings, and that the said judgment was not revived or re-docketed in manner required by the said act, within 5 years next after the passing of the said act, nor within twenty years next before the execution of the said deed of 1834.

And the said Master accordingly found, that the plaintiff's demands against the lands comprised in said deed were, for the reasons aforesaid, entitled to priority of the demands of the defendant Thomas O'Dowd; and, therefore, that O'Dowd's claim on foot of the judgment, and of the costs in the Exchequer suit, must be postponed to the claims of the plaintiff; and that, therefore, the said O'Dowd's claim was not, as against the mortgage so executed and assigned, a charge prior to the date of the said deed of 1st August, 1819; and that, consequently, plaintiffs were the first incumbrancers.

The defendant O'Dowd filed two exceptions to this report; by which he insisted, that, according to the true construction of the act, the said judgment did not require to be re-docketed, in pursuance of its provisions as against the claim of the plaintiffs, the deed of the 1st August, 1819, having been *executed prior to the passing of the act*; and the plaintiffs, in respect of their title under the deed of 21st February, 1834, not being *purchasers for valuable consideration*, within the meaning of the act.

The cause now came on for further directions on the said report of Master Townsend, and the exception of O'Dowd.

Mr. Blackburne, Q. C., Messrs. Baker and O'Malley, for the plaintiffs, argued, that the 2d section of the act applied as well to purchasers before as after the passing of the act; and that, if the present suit had been instituted by Francis Knox, the original grantee in the deed of 1819, he would be entitled to avail himself of the statute, against O'Dowd's judgment. And they further argued, that even if that were not so, still the present plaintiffs, claiming under the deed of the 21st February, 1834, were purchasers for valuable consideration, within the meaning of the statute.

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MARTIN

v.

D'ARCY.

KNOX

v.

KELLY.

(*ex. rel.*)

*Master Townsend's report: that O'Dowd's judgment was barred by re-docketing act as against plaintiffs.*

*O'Dowd's exceptions.*

*Argument for plaintiffs:—*

1. *That 2d section of act applies to purchasers before the act.*

2. *That at all events the last purchase was since the act.*

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MARTIN  
v.  
D'ARCY.

—  
KNOX  
v.  
KELLY.  
(*ex rel.*)

Mr. *Collins*, Q. C., and Mr. *Monahan*, for O'Dowd, argued that, so far as the plaintiff's claim rested on the deed of 1819, the statute did not apply; for they said it was clear, that the 2d section applied only to purchases made after the passing of the act. And, as to the deed of 1834, they argued, that such a conveyance was not a deed for valuable consideration, within the meaning of the act.

The LORD CHANCELLOR ruled both points for the plaintiffs. He held that the 2d section applied to purchases, as well before as after the passing of the act; and, therefore, that all persons claiming under the deed of 1819 were entitled to its protection: and he also held, that the deed of 1834 was a purchase for valuable consideration, within the meaning of the statute.

—◆—  
*Saturday, 1st December.*

## PRACTICE—ISSUE BY WAY OF CIVIL BILL APPEAL.

HARRIS v. CULLEN.

Issue directed by consent to be tried by civil bill appeal.

This was a bill for a specific performance of a written agreement alleged to have been executed by the defendant.

The defendant by his answer denied having ever executed the agreement.

The subscribing witness to the document was examined in the cause on behalf of the plaintiffs, and deposed that he was present, and saw the defendant execute the agreement. Another witness deposed, that he was acquainted with the hand-writing of the defendant, and that he believed the signature to be his hand-writing.

The document in question was produced at the hearing, and appeared to be a proposal by the plaintiffs for a lease of two small portions of land then in their occupation. At the foot was the alleged agreement by the defendant, which was as follows:—

“Sirs—I agree to give you a lease when convenient, or at any time you call for it.

EDWARD CULLEN.”

The whole was on one sheet of paper. It was dated 25th March, 1830, but the subscribing witness who deposed to its execution, swore that it was signed by the defendant on Easter Monday, in the year 1835.

The two pieces of land in question (the larger of which was only five acres) were held by the plaintiffs as tenants from year to year, under the defendant. The latter had served notice to quit, and had proceeded by civil bill ejectment in the Assistant Barrister's court, against the plaintiffs.

On the 19th of June, 1838, plaintiffs moved for an injunction to res-

train the proceedings in the Assistant Barrister's court, and the Master of the Rolls then made an order to restrain the defendant "from executing any civil bill decrees to be had on the said ejectments until the hearing of this cause, plaintiffs by their counsel undertaking to give a consent for any decree or decrees in said civil bill ejectment, within one week from the date of this order."

Civil bill decrees for the possession had accordingly been obtained by the defendant Edward Cullen in the Assistant Barrister's court.

Mr. *W. Brooke* Q. C., Messrs. *O'Leary* and *Atthill* for the plaintiffs.

If this were not the hand-writing of the defendant, he might have examined witnesses to prove that fact. But he has examined no witnesses.

Mr. *R. C. Walker* for the defendant.—The witness swears that on Easter Monday, 1835, the defendant at a fair signed this document. The date appearing by the instrument not to be 1835 but 1830. We are ready to consent to try the case by appeal from the decrees obtained in the Assistant Barrister's court. This instrument, if genuine, will be a defence to our ejectments under the civil bill acts.\*

Mr. *W. Brooke* Q. C.—We offered early in the cause, before the injunction issued, to consent to bring ejectments in the civil bill court, as against overholding tenants, and that a jury should be empanelled to try the matter in dispute. They gave us no answer to that offer, and having forced us on to a hearing, we cannot now consent to the proposal made.

LORD CHANCELLOR.—*You had better consent to that proposal.*

Mr. *W. Brooke*.—After that intimation from your Lordship, being desirous of advising my clients for the best, I submit to the proposal.

The order was as follows :—

Let this cause stand over, and by consent of the parties plaintiffs and defendants, let the plaintiffs enter appeals against the civil bill decrees had on the ejectments in this cause, in the court of the Assistant Barrister for the Queen's County, pursuant to the terms of the injunction order of this honorable

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\* 56 *George* 3, c. 88, s. 2. By section 9, the defendant in civil bill ejectment is entitled on hearing of civil bill, to every defence which he may have either in law or in equity. It does not appear

whether, on the motion for an injunction, any discussion arose whether an injunction to restrain proceedings under this act was necessary, in order to give the party the benefit of an equitable defence.

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court, bearing date the 19th June, 1838, for the recovery of the lands in the pleadings named. Such appeals to be tried before the next going Judge of Assize for the said county. The defendant by his counsel consenting that such appeals shall now be so entered and tried. The said defendant further consenting to waive any irregularity arising from the period which has elapsed since the time of obtaining such civil bill decrees, without appeals having been entered on the part of the plaintiffs in this cause, against same. And let the plaintiffs and defendant respectively be at liberty at the trial of such appeals, to produce and examine all such witnesses, and to prove and read all such vouchers and documents, as they might have produced, proved, examined and read, on the hearing of such civil bill ejectments, before the said Assistant Barrister, and all such pleadings, proofs, and exhibits, as the said plaintiffs and defendant produced and read on the hearing of this cause in this court.

And let all further directions abide the decision of such appeal. Such decision to be certified by the Judge of Assize, before whom the same shall be tried, on or before the 1st day of Easter Term, 1839.

And let the injunction obtained in this cause be continued until further order of this court.—*Reg. Lib. Fol. 428.* 1 Dec. 1838.

## ROLLS.

*Friday, November 9th.*

## INJUNCTION TO STAY WASTE—DOUBTFUL TITLE.

LOWE v. LUCEY, and Others.

This was an application on the part of the defendants, to discharge the conditional order which had been obtained last Trinity term to restrain them from cutting turf on the lands of Knockavalleen, in the possession of the plaintiff. The affidavit, upon which the conditional order had been obtained, stated, that Mary Brown, being seised of the said lands of Knockavalleen, together with other lands called Garden, situate about two miles from the lands of Knockavalleen, demised the said last mentioned lands to one Nicholas Lowe, who, by deed bearing date the 9th of July, 1832, demised the same to the plaintiff for the term of 99 years; that the said lands of Knockavalleen consisted principally of bog, and were of little value except for the turbary thereon; that William Sheehan, who became entitled to the lands of Garden, by a title also derived through Mary Brown, had sub-divided the same into a great number of small holdings, which he had let out to the defendants, his undertenants, who had entered upon the said lands of Knockavalleen, in the possession of the plaintiff, and had cut a large quantity of turf thereon, part of which they had already carried away; that the defendants had never before claimed the privilege of cutting turf upon the plaintiff's lands, and unless restrained by the order of the court, the turbary thereon would soon be completely exhausted.

The defendants now shewed cause, and in their affidavit set out the lease, made by Mary Brown, to the said William Sheehan, bearing date the 6th of August, 1784, (which was prior to the demise made to Nicholas Lowe,) and in which there was the following covenant:—"And the said Mary Brown, doth, for herself, her heirs and assigns, covenant, promise and agree to and with the said William Sheehan, his *executors, administrators, and assigns*, that he and they should and would have full power and free liberty of cutting and carrying away from off the mountain of Knockavalleen, whatever quantity of turf as shall be consumed on the said demised premises, yearly, during the continuance of the said demise." The affidavit further stated, that the privilege of cutting turf on the lands of Knockavalleen had been frequently asserted by William Sheehan, and his under-tenants.

The court will not entertain a motion for an injunction, in the nature of a writ of *estrepement* to restrain waste, except where the title is clear.



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Mr. *Pigot*, Q. C. and Mr. *Graves*, for the defendants, now contended, that by virtue of the covenant in the lease of 1784, William Sheehan, and all his under-tenants had a right to enter upon the lands in the possession of the plaintiff, and cut such quantity of turf as should be necessary for their own consumption; that the defendants had not cut turf for the purpose of sale, nor did they claim that right. Counsel therefore submitted that the conditional order should be discharged, with costs.

Mr. *Collins*, Q. C. and Mr. *B. C. Lloyd*, *contra*. The covenant stated in the lease of 1784 has now been put forward for the first time—the plaintiff never heard of it before; but if the case is to rest upon the construction of that covenant, we are prepared to contend that, as that covenant merely authorized William Sheehan, his *executors, administrators and assigns*, to cut turf upon the lands in the possession of the plaintiff, it gave no right to the defendants, who are merely the undertenants of William Sheehan, to do so. There is a variety of cases to shew, that in a covenant of this nature, the word *assigns* does not comprehend under-lessees. A case similar to this arose in the court of Exchequer, (a) in which that court, under the words of the covenant in that case, held, that the under-lessees had the right of cutting turf, but the decision was founded expressly on the ground that the word “under-lessees” was mentioned in the covenant as well as the word “assignees:” had the former word been omitted, the court would not have come to that decision. If William Sheehan’s under-lessees were entitled to cut turf upon the plaintiff’s lands, under the construction of the covenant, yet that covenant should be construed with reference, and restricted to those persons who were in possession of the lands of Garden, at the time the covenant was made (b). It could not be held to authorize William Sheehan to people his own lands with a multitude of under-tenants, for the purpose of having the benefit of the turbary on the lands in the plaintiff’s possession.—[MASTER OF THE ROLLS—Can I decide upon the construction of this covenant, in the absence of the representative of Mary Brown?—We will undertake to amend the bill, and bring the representative of Mary Brown before the court, if your Lordship should then be disposed to entertain the question as to the construction of the covenant.

MASTER OF THE ROLLS. I do not mean to say, that the true construction of the covenant may not be such as has been contended for by the counsel for the plaintiff:—on this point I give no opinion; but in an injunction motion to restrain waste, the court interferes only where the title is clear and free from dispute; here there is a difficult question of

(a) Hill v. Barry.

(b) Luttrell’s case, 4 Rep 56

law, which the plaintiff must have decided in her favor by a different proceeding, before she is entitled to come here for an injunction: at present I will make no rule upon the motion, and leave the plaintiff to bring such action at law as she may be advised, to try the construction of the covenant. But as the defendant's affidavit has not distinctly stated, that the defendants have asserted the right of cutting turf since the date of the lease to the plaintiff. I will give no costs to either party.\*

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LUCY.

Friday, November 23d, 1838.

RECEIVER UNDER SHERIFFS' ACT—TERM OF YEARS—  
NOTICE TO PERSONS IN POSSESSION.

REYNOLDS, Petitioner; FALKNER, Respondent.

Mr. HAIRE, Q. C., on behalf of one Plunket, a third person, came in to shew cause against the conditional order for a receiver under the 5 & 6 W. 4, ch. 55, in this matter.

The grounds of objection were two, viz.—that the estate, over which the receiver is here sought to be extended, is a term of years, as to which it has been held, in the court of Exchequer, that this act does not apply. Secondly, that, by deed of 10th of May, 1835, the respondent had assigned, to Plunket, all his interest in the premises; subject, however, to an annuity for the life of the respondent, and which Plunket had regularly paid up to the last gale; and that Plunket, since 1825, has been, and still continues, in receipt of the rents, and has had no notice of the present proceedings.

The MASTER OF THE ROLLS observed, that the question as to the term of years had not come before this court, and that he was not then prepared to say he would follow the judgment of the court of Exchequer upon this point. He would wish to hear the question fully discussed.—However, in the present case, there is no need of such discussion, if Plunket has not been served with the conditional order. If your affidavit fully states, that before, and at the time, and since the conditional order was obtained, you were in receipt of the rents, under the

It is as yet unsettled, in this court, whether or not a receiver under the 5 & 6 W. 4. ch. 55, will be extended over a term of years.

If a party in receipt of the rents shews as cause against a conditional order for a receiver under this act, that it has not been served upon himself, the cause will be allowed, and the petitioner obliged to pay the costs of the application.

\* Independently of the doubtful title, the injunction in this case appears to have been objectionable upon other grounds. See *Sandy's v. Murray, and others*, ante p. 29.

*Nov. 1838.* deed of May, 1825, and that you have not been served with the conditional order, there is an end of the receiver in this case.

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These facts appearing upon the affidavit, his HONOR said—

Allow the cause shewn, with costs.

*Saturday, November 24th, 1838.*

DEMURRER—PARTIES—STATING AND CHARGING  
PARTS OF BILL.

M'DERMOTT v. EVERITT and others.

To a bill by the heir-at-law against the devisee of a mortgagor, stating, *inter alia*, the outstanding mortgage in fee, and praying that plaintiff should be declared entitled to the real estate of the mortgagor, notwithstanding the will; and that the devisee should deliver up possession thereof, and of the title deeds, and should account as trustee, for the rents already received:—*Held*, on demurrer, for want of parties, that the mortgagee was not

The bill prayed, that the real estates of Anthony M'Dermott, deceased, might, notwithstanding his will, be declared to have descended to the plaintiff, as his heir-at-law; and that the defendants might be decreed to deliver up possession thereof: or that the plaintiff might be put into the receipt of the rents. That, if the defendants should insist on the validity of the said will, either an issue might be directed, to try whether or not the freehold estates of the said Anthony were well devised by him, or descended to plaintiff as his heir-at-law; or else, that plaintiff might be at liberty to bring an ejectment, and that all proper, necessary, and usual directions might be given for such trial at law; and that said defendants might produce all the title deeds, &c., or such of them, relating to said real estates, as might be necessary on such trial. That they might be restrained from setting up the outstanding mortgage, in bill stated, so as to defeat plaintiff in any such issue or action of ejectment. That the defendants might be decreed to deliver over to the plaintiff all the title deeds, evidences, and writings in their respective possession, or power, relating to said real estates, or that same might be deposited in court. That the defendant Charlotte Everitt might be declared to have received the rents, as as a trustee for plaintiff; and that she and her husband should account for the same, under the direction of the court, and be restrained from further interfering with the

a necessary party, as his rights were admitted, and not affected by the suit.

The bill stated, That, in 1822, the devisee intermarried with T. E., one of the defendants: and that she, knowing T. E. to be alive, but concealing her marriage, and bearing her maiden name, in the year 1826 intermarried with the testator. That the testator never discovered the previous marriage; but, believing the devisee to be his lawful wife, made his will, thereby devising to her, as his "dear wife, C. M.," all his real estate, &c. The bill charged, that the testator's belief, that the devisee was his lawful wife, was the sole motive of the devise, and that it was therefore void:—*Held*, upon demurrer, for want of equity, that, as from the statement it might be inferred, though not conclusively, that the mistaken character of the devise was the sole motive of the devise, the plaintiff had a right to rely upon the charge, as a part of the case made by his bill.

possession or receipt of the rents. That, if necessary, a receiver should be appointed, and that plaintiff might have such further and other relief, &c, &c.

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The bill stated that Charlotte Everitt, the wife of Thomas Everitt, of the City-road, London, became some time before the 11th January, 1826, acquainted with Anthony M'Dermott, formerly of the city of Dublin, and now deceased. That she then held herself out to the world, as an unmarried woman, and passed by the name of Charlotte Davey, which had been her maiden name, although she was in fact the wife of the defendant, Thomas Everitt, to whom she had been married on the 11th June, 1822, at Deal, in the county of Kent. That some time after, the said Anthony M'Dermott became acquainted with her, in the full belief that she had never been married, he made proposals of marriage to her, which she accepted; and, on the 11th January, 1826, the marriage ceremony was solemnised between him and the defendant, Charlotte Everitt, by the description of Charlotte Davey, spinster, a minor. The marriage was stated in the registry to have been by license, with the consent of her father. That at the time of the marriage, the said Charlotte knew that Thomas Everitt was living; that M'Dermott never discovered the marriage with Everitt; but, in the firm belief that said Charlotte was his own lawful wife, duly made and published his last will and testament, bearing date the 10th day of September, 1832; by which, after directing payment of debts, &c., he gave and bequeathed all his freehold lands, situate at Roughgrange, in the Carberries, in the county Westmeath, &c., and also his three messuages in Gloucester-street, in the city of Dublin, and all other his real estates whatsoever, and wheresoever, "*unto his dear wife Charlotte M'Dermott, her heirs and assigns, for ever.*" And he also gave and bequeathed unto *his said dear wife*, all his personal estate and effects, of every kind and description, to and for her own use and benefit; and he thereby appointed her sole executrix of his will. That the deviser died on the 16th September following; and the defendant Charlotte, by the name of Charlotte M'Dermott, widow, proved the will in the Prerogative Courts of Canterbury and Armagh.

That the plaintiff is the nephew and heir at law of the deviser; and that he had but recently discovered, that the marriage of the said Anthony M'Dermott and the defendant Charlotte, was void. That the said Charlotte had entered into, and continued in receipt of the rents, up to the present time.

That M'Dermott, being seized of the county Westmeath estates to such uses as he should appoint, by deed, bearing date the 15th of July, 1824, appointed them to a person named William Witham, in fee, by way of Mortgage, to secure £5000; and that the legal estate in the lands of Roughgrange, being still outstanding in Witham, M'Dermott was at

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the time of his death, entitled only to the equity of redemption thereon. But as to the houses in Gloucester-street, the plaintiff could not with certainty set forth, whether the deviser was seized thereof with an estate of freehold or only possessed for a term of years; inasmuch as the title deeds, under which the same were held, were in the possession of the defendant. But plaintiff insisted that the devise was void, and that the rents had been received to his use as heir at law, and that for his benefit, the defendant Charlotte should be considered a trustee. That the defendant Charlotte subsequently contracted a third marriage in the year 1834, with a person named John Calverly, whose name she has since assumed. That plaintiff was unable to proceed by ejectment in a court of law, to recover the lands of Roughgrange, by reason of the mortgage, or the houses in Dublin, by reason of legal demises thereof to the occupying tenants, made by M'Dermott in his lifetime, for long terms of years which are still subsisting.—The bill afterwards *charged*, that the testator's belief that the said Charlotte was his own lawful wife was his sole motive for making the devise.

To this bill a demurrer was taken, on behalf of the defendant Charlotte Calverly, who had obtained liberty to appear and defend separately from the defendant Thomas Everitt. The causes of demurrer assigned were—

First—That the plaintiff had not by his bill made such a case, as entitled him in a court of Equity to any discovery or relief.

Second—That there was no equity contained in the bill, to entitle plaintiff to the relief or discovery prayed.

Third—That William Witham was not a party defendant to the bill; and

Fourth—That there was not annexed to the bill, any affidavit of the plaintiff, stating that he had not in his possession the title deeds and writings in bill mentioned.

Mr. Barry, for the demurrer.—The case made by the bill is one of mere mis-description in the devise, which is immaterial unless fraud is connected with it. A character erroneously attributed to the devisees is not sufficient to invalidate the devise. It must appear that the character was fraudulently assumed to deceive the deviser, and that such character was in fact the sole motive of his bounty. The leading case of *Kennell v. Abbott* (a) was decided on this principle. There, Lord Alvanly, in his judgment, specially desires to be understood, that where from circumstances not moving from the legatee himself, a description is inapplicable—as where a testator gives a legacy to a child from motives of affection, supposing it his own, but is imposed on in that respect,

(a) 4 Ves. 802

the legacy ought to fail. In *Standen v. Standen* (b), it was held, that a false description given to legatees is immaterial, where there is no doubt of the identity of the parties intended by the testator. *Schloss v. Stibel* (c), was a case in which a man, contemplating marriage with a lady, bequeathed a legacy to her "as his wife;" but died before the marriage took effect. The legatee was held entitled to the legacy; although it was argued that it was doubtful whether the testator intended her to take, if she did not fill the character, he, by anticipation attributed to her. The facts established in evidence, in the recent case of *Giles v. Giles* (d), were much stronger than all the statements of the present bill. In that case it was proved, that the testator believed the legatee to have been his lawful wife; and that the very solicitor who prepared the will, in which she was described as such, knew that her first and lawful husband was then living, but suppressed the fact from the testator. Yet, the legatee was held entitled to the legacy.

The rule of pleading, that the stating part of a bill should contain every allegation necessary to sustain a plaintiff's equity is settled; but the bill here does not aver that the defendant's filling the character of the devisor's wife was the sole motive of the will in her favor. Personal regard, gratitude for affectionate conduct, might have induced him to make such a will, even if all the facts stated had been made known to him; and such motives should have been negatived by a distinct and positive averment. Upon the case stated in this bill, the court could not pronounce the devise invalid; and therefore the plaintiff, as heir at law, has no title to any relief whatever, as against the defendant, and consequently has no right to any discovery.

But if the plaintiff has a case, his remedy is at law. Courts of Equity disclaim all right to decide on the validity of wills; therefore a bill seeking such a decision is clearly demurrable. *Jones v. Jones* (e); *Jones v. Frost* (f); *Keogh v. Keogh* (g). It may be argued, that the plaintiff is entitled to so much of the relief prayed, as seeks to restrain the defendant from setting up the outstanding legal estate to defeat a trial of the right at law; but the bill does not make a case even for that relief. For anything that appears to the contrary, the tenants in possession may hold under demises made since the mortgage; and, if the devise be invalid, the heir at law of the mortgagor may enforce his rights at law, by distress for rents, as his tenants would be estopped from disputing the title under which they hold.

MASTER OF THE ROLLS.—How could the plaintiff distrain without the leases? How could he avow?

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(b) 2 Ves. jun. 559.

(d) 1 Keen. 685.

(f) 3 Mad. 1.

(c) 6 Sim. 1.

(e) 3 Mer. 161.

(g) 2 Mol.

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If the possession of the deeds and leases would give a legal remedy, and that the want of them brings the plaintiff to this court, the usual affidavit ought to have been annexed to the bill. As it was not, the demurrer on that ground alone must be allowed. The jurisdiction is sought to be transferred from a court of Law to a court of Equity. *Whitchurch v. Golding* (h); *Dormer v. Fortescue* (i).

So far as the bill seeks a receiver, possession and an account, Witham the mortgagee was a necessary party, and ought to have been named as a defendant.

Mr. Theobald M'Kenna, for the plaintiff. I shall take the objections to the bill in the order in which they have been discussed upon the other side.

First: as to the want of equity.—I submit, that sufficient grounds for impeaching the will appear upon the bill, which contains a charge, not adverted to in the argument on the other side, that the consideration of the defendant Charlotte's being the deviser's wife was his sole motive for making the devise. [Mr. Barry,—The plaintiff cannot resort to the charges in the bill to eke out his case. It is a settled rule of pleading, that the *statement* in the bill must fully shew the state of facts upon which the plaintiff means to found his equity for the relief he seeks; as otherwise, the defendant cannot know, with any certainty, what the case is, against which he is to defend himself.]—It is not suggested that there is any uncertainty as to the case made by this bill; nor am I aware of any such rule of rigorous exclusiveness as that stated upon the other side—[MASTER OF THE ROLLS—The fraud charged is not fraud by the devisee in procuring the devise.]—It is in fact fraud by the devisee in procuring the devise; or at least a fraud by the devisee, of which the devise was the consequence. It is quite plain that the devise was made upon a supposition, which the devisee knew to be false; and I am entitled to read the devise as if the testator had said, "I devise to Charlotte M'Dermott, *because she is my wife*."—The devisee, knowing herself to be the wife of another man, (Everitt,) fraudulently imposed upon the testator the belief that she was his wife; and it cannot be denied that the devise was the consequence of that imposition. It is therefore void, according to the whole current of authorities, from the earliest writers on wills, down to the latest decisions on the subject.—*Swinburne on wills* (k); *Godolphin's Legacy* (l); *Kennell v. Abbott* (m); *Capel v. French* (n). *Giles v. Giles* (o) is distinguishable from the present case. The plain principle to be derived

(h) 2 P. W. 541.

(k) part 7, s. 4.

(m) 4 Ves. 22.

(i) 3 Atk. 132.

(l) pt. 3rd.

(n) 3 Ves. 321.

-(o) 1 Kcc. 65.

from these authorities is this, that where a particular character or quality is the cause of a devise, and there is an error in such character or quality, the devise is void, even although there be no fraud.

I admit that this court will not proceed to try the mere validity of a will, when the question as to such validity is not embarrassed by others, and there is no hindrance to the plaintiff's relief at law. But where, as in this case, the heir at law of the testator has shewn by his bill, that the devise was made in error, and that such error was in consequence of fraud, on the part of the devisee; and has also shewn legal impediments in his way, the court will afford him every facility, and grant all the relief, both direct and consequent, which he has prayed.

The decision in *Jones v. Jones*, (p) cited on the other side, was grounded upon the absence of any allegation whatever, in the bill, that any outstanding terms existed. We do not deny, that the averment of the legal impediment to the plaintiff's proceedings at law is material and necessary; but we submit, that as the bill in this case particularly shews the legal impediment in the outstanding legal estate in Witham, and also the grounds upon which the invalidity of the will plainly appears, the plaintiff is entitled in equity to the relief prayed. The averment of legal bars sustains the plaintiff's equity: for it is settled, that a plea negating the existence of legal bars is a good plea; because of the materiality of the averment upon which the equity of the bill was sustained. *Pemberton v. Pemberton* (q); *Armitage v. Wandsworth* (r); *Wright v. Taylor* (s); *Scafe v. Scafe* (t); *Winchelsea v. Wauchope* (u). But at any rate, the plaintiff is plainly entitled to so much of the relief prayed as relates to the legal bars, and as the demurrer goes to the whole bill, it must therefore fail.

As to the objection that Witham, the mortgagee, should have been made a defendant,

THE MASTER OF THE ROLLS said, he did not think it then necessary to trouble counsel upon that objection; but would be glad to hear the counsel on the same side with Mr. *M'Kenna*, as to the others.

Mr. *Warren*, Q. C., on the same side with Mr. *M'Kenna*, said, he had not heard the argument for the demurrer, and therefore could not particularly reply to it; but would then briefly apply himself to what he conceived to be the main question raised by the demurrer, viz: whether or not the plaintiff had, by his bill, made a case, entitling him to all or any part of the relief sought?

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(p) 3 Y'er. 161.

(r) 1 Mad. 18.

(t) 4 Russ. 309.

(q) 13 Ves. 289.

(s) 2 Russ. & Myl. 1.

(u) 3 Russ. 441.



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The plaintiff does not insist that the will of Anthony M'Dermott is void at law. Supposing the will to be good at law, the plaintiff has a right to come to this court and shew that it was obtained under such fraudulent circumstances as must induce this court to hold the devisee to be a trustee merely, for the persons entitled, as in the case of *Segrave v. Kerwan* (v); the principle of which was subsequently acted on in *Bulkley, appellt. v. Wilford, respd.* (x). If on the other hand, the will be void at law, the plaintiff shews the legal bars as to which he is clearly entitled to be relieved.

The objection that the plaintiff is not entitled to rely upon the charging part of his bill cannot be maintained. The use of the charging part is, to develope more fully, or to put more pointedly, matters previously stated; and no more has been done in this bill.

Mr. Keatings, Q. C., replied for the demurrer. This is a demurrer to the whole bill. We say—

First—That the plaintiff has not made a case entitling him to any part of the relief prayed. And secondly: that even admitting there is some part of the relief prayed to which the plaintiff might be entitled, yet he cannot have any relief under this bill, as the proper parties are not before the court.

The plaintiff prays, *that he may be declared entitled, "notwithstanding the will."* His case is, that the will is void at law, and not that the will is good at law, as in the case supposed by Mr. Warren. But he further prays, that if the validity of the will be insisted on, an issue may be directed, or an ejectment, &c. and that the defendant Charlotte may be declared to have received the rents, as a trustee for plaintiff, and that she and her husband may account for the same.

There are two classes of property mentioned in the bill: the Westmeath estate, and the houses in Gloucester street. The former is positively alleged to be real estate; but as to the latter, the plaintiff says he cannot state whether the estate be real or personal, and this, for the present, therefore must be considered as out of the question.—If the plaintiff's case be true, the defendant Charlotte has not the legal estate in the Westmeath lands, which, according to the plaintiff's own shewing, is vested in Witham the mortgagee. It does not appear that the defendant Charlotte is in possession of the mortgaged premises; nor that there is any collusion between her and Witham to prevent the plaintiff trying his right at law. Then, in the absence of Witham the mortgagee, the plaintiff proceeds to state, that he is heir at law, and to allege circumstances of concealment respecting the marriage of the defendant with Anthony M'Dermott. But he should have gone much further, and

either have admitted the due execution of the will, or have shewn directly that it was void. The only case appearing upon this pleading is one of mis-description in the devise, upon which the plaintiff can found no equity; for the court will presume, especially in a case of this kind, that other motives besides the mistaken character operated on the mind of the devisor.

It is said that the necessary averment, of fraud on the part of the devisee, sufficiently appears in the charging part of the bill; but this is a mistake. *Flinn v. Field* (y), followed by *M'Namara v. Sweetman* (x). Therefore, rejecting what the plaintiff has no right to rely upon, the present case is not distinguishable from *Giles v. Giles* (aa). If a party comes to establish legal rights, he must shew that he has legal rights. *Martin v. Nichols* (bb).

But supposing that the plaintiff has a case as heir-at-law, the question remains, has he a right to any portion of the relief sought? Has he a right to bring ejectment against a person not in possession? The lands in Westmeath are in the possession of the tenants, and not of the defendant.—[MASTER OF THE ROLLS. Lord Guillamore used to say, that receipt of the rents was the best kind of possession.]—According to the plaintiff's case, the defendant has no title, either legal or equitable, to receive the rents; and the naked fact of receipt cannot of itself constitute possession.

But this bill cannot be entertained in the absence of Witham. The mortgage is expressly stated to be outstanding; the mortgagee is therefore a necessary party, at least as to that part of the bill which seeks possession and an account of the rents received, and the delivery of the title deeds. As to these, the court cannot proceed in the absence of the legal owner of the estate. The title deeds cannot be had behind the back of the person having the legal estate. *Pincent v. Pincent* (cc). According to Mr. Warren's view of the case, viz., that the will is good at law, but obtained under such circumstances of fraud, as should induce this court to declare the devisee to be a mere trustee, and liable to account for the rents received, the question would be—*trustee for whom?* Whether for the plaintiff or the person having the legal estate?

The rents to be accounted for, according to the case made, are not bye-gone rents, but rents received in trust for the person entitled to them; and, unquestionably, the mortgagee is the person first entitled to them. Suppose this bill taken *pro confesso*, would a decree obtained by the plaintiff operate as a bar to, or release of, all claims of the mortgagee against the defendant Charlotte, who, according to the plaintiff's case, has received the rents to which the mortgagee alone was entitled?

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(y) 2 Anst. 513

(aa) 1 Keen, 685.

(z) 1 Hog. 29.

(bb) 3 Sim. 458.

(cc) 3 Atk. 510.

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Assuredly not. Upon first principles, therefore, the defendant is entitled to have the mortgagee before the court, that the litigation may be final, and that the money, to be refunded, if any, may be paid to the person legally entitled.

We therefore submit, that the plaintiff's remedy, if any he has, is at law; that he has made no case for any part of the relief he has prayed; and that, even admitting that he might be entitled to a part of the relief prayed, the bill cannot be entertained for want of proper parties.

*Curia adv. vult.*

*Tuesday, December 3d.*

The MASTER OF THE ROLLS, after briefly stating the contents of the bill, and the causes of demurrer assigned, said—I will take the objection of the want of parties first. In reference to this objection, I am of opinion that W. Witham is not a necessary party, as his title is not disputed, nor are his rights in any respect affected by the present suit. The argument at the bar, arising out of the prayer for the delivery of the title-deeds has been pushed too far in the present case. Upon principle, this ground of demurrer must be overruled. If it were necessary to refer to the authority of cases, that of *Swan v. Swan* (*dd*) is directly in point. That was a bill for a partition, and it was decided that a mortgagee of the whole estate was not a necessary party.

The other ground of demurrer relied on is of a technical kind, arising out of the rules of equity pleading. It was argued that the case *stated* was one of mere mis-description, in itself immaterial, and not rendering the will invalid, and that the plaintiff has no right to resort to the charging part of his bill. There is certainly some foundation for the distinction taken between the stating and charging parts of a bill; it is to be regretted, that the forms of equity pleading are not more concise, and that they contain so many unnecessary repetitions.—The case of *Flint v. Flint* (*ee*), and *M'Namara v. Sweetman* (*ff*), appear to support the objection. The former case is very inaccurately reported; but sufficient appears to shew, that the whole equity of the plaintiff in that case was contained in the charging part of the bill. Every charge must be founded on a previous statement; but the case of *Partridge v. Haycroft* (*gg*) is an authority to shew that the statement may be enlarged by the charging part. Lord Eldon, in his judgment in that case, said, that “Lord Kenyon never would put in the charging “part, which does little more than *unfold* and *enlarge* the statement.” In the bill now before the court, there is, I think, a sufficient statement to warrant the plaintiff in charging, that the sole motive of the de-

(*dd*) 8 Price.

(*ff*) 1 Hog. 29.

(*ee*) 2 Anst. 543.

(*gg*) 11 Vcs. 574.

visor was his mistaken impression that the defendant filled the character of his wife. The plaintiff may be under a difficulty, at the hearing, in establishing that such was the sole motive of the will, as it appears that the parties lived for several years happily together; however, the whole case made is sufficient to entitle the plaintiff to a part, at least, of the relief sought.

It has long since been solemnly decided, that this court will not pronounce on the validity of a will; but it is equally well settled, that upon a sufficient case shewn, this court will give its assistance to remove any impediments to the trial of the will in the proper court having jurisdiction for that purpose. The existence of the mortgage is a bar in the present case to the trial of the right at law, and the plaintiff is entitled to have the defendants restrained from setting it up to defeat him. It is no answer to say he might distrain; as he could not avow while the leases are in the possession of the defendants. Therefore, as the demurrer is to the whole bill, and the plaintiff is entitled to some of the relief sought, the demurrer is too extensive, and must be overruled.

His HONOR, on the application of Mr. *Keatinge*, said, that as the questions were fairly raised for discussion, and as the costs were in the discretion of the court, he would direct the costs of the arguments to be costs in the cause.

Demurrer overruled.

*Thursday, November 29th.*

PRACTICE—PURCHASE—RENT.

SCOTT v. ROTHE.

Mr. LITTON, Q. C., on behalf of a person named Flood, a purchaser under the decree in this cause, moved that the receiver should pay over to the purchaser the rents received by him out of the premises, for the gale ending the 1st of May last; and that he should be restrained from further receiving the rents of said premises, during the life of the defendant George Rothe.

The sale under the decree was in April last. The gale days are 1st May and 1st of November. The purchaser, Flood, lodged one-fourth of his purchase-money on the 28th of April, and the remaining three-fourths on the 1st of May. It is true, the sale was not confirmed until

afterwards:—*Held*, that the purchaser was entitled to the rents due on the 1st of May, when the remaining three-fourths of the purchase-money were lodged.

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afterwards; but, according to the settled rule of the court, the purchaser is entitled to the rents from the gale day next before his paying in the three-fourths of his purchase-money; though the sale may not be confirmed until afterwards. *Prendergast v. Eyre* (a); *Adsom v. Townsend* (b). Therefore, in this case the purchaser, whose estate is for the life of the defendant George Rothe, is entitled to the rents, from the 1st of November, being the gale day preceding the payment of his purchase-money.

MASTER OF THE ROLLS. This is really too hard. The course of the court is, for the purchaser to lodge one-fourth of his purchase-money, and then move to confirm the sale. But here the question is, whether a purchaser, coming on the gale day, and paying in the whole of the purchase-money, is therefore to be entitled to the rents which were accruing during the preceding six months. The authorities certainly are strong in the purchaser's favor; and plaintiffs, so long as this rule continues, should be very cautious how they sell near to a gale day. However, I will not make any order, until I shall have conferred with the Lord Chancellor upon the subject.

*Wednesday, November 30th.*

His HONOR, having conferred with the Lord Chancellor, said he should grant Mr. *Litton's* application and accordingly ordered—

That the receiver should pay to Mr. Flood the sum of £78. 9s., being the sum received by him, on account of the rents due up to and for the 1st of May last, out of the lands, &c., after deducting the head rents and receiver's fees; and let him be restrained from receiving any further portion of said rents, during the life of the defendant George Rothe.

(a) 4 Law Rec. N. S. 149.

(b) 1 Jac. & W. 636.

*Thursday, November 29th.*

APPLICATION TO AMEND EVIDENCE GIVEN BY  
MISTAKE—BEFORE PUBLICATION.

KNOX v. KNOX.

Mr. LITTON, Q. C., on behalf of the plaintiff, and of Thomas Knox, one of the witnesses who had been examined on the part of the defendant in this cause, moved that the said Thomas Knox might be at liberty to go before Thomas Jones, Esq., the Commissioner Examiner, to be again examined in relation to the several particulars stated in the affidavit of the said Thomas Knox, the answers of the said Thomas Knox having been given by mistake and in error; or for such other order, &c.

Motion for liberty to re-examine a witness refused, the application being before publication.

The affidavit of the witness stated that he was eighty-two years old, and younger brother of the defendant; and that he was called on to give evidence as a witness on behalf of said defendant, on a commission which issued in this cause, and held in Ballina, in the county of Mayo, in October last. That accordingly, on the 8th of October, he repaired to the lodging of Mr. Jones, the Commissioner, and was there sworn and examined; but that being, by reason of his great age, much agitated during the course of the examination, when the interrogatory was put to him, "Who paid the amount of the two bills passed by this deponent to Mr. John Bourke, the sub-sheriff, when he brought down the execution against this deponent's property?" He replied, that Mr. Frank Knox (the defendant) paid one of the bills, and that he himself paid the other; when he should have said that he sent provision to Dublin in bank notes, to the amount of £100, enclosed to the said Frank Knox, to take up one of the said bills, but that this deponent had never received either bill or receipt since; and that he had sent £51. 2s. 5d. to Mr. Livesay, attorney, to take up the other.

The deponent also stated, he believed he had given his testimony, that the signature of the plaintiff, as subscribed to a certain letter then produced to him, was the handwriting of the plaintiff, as deponent had in his possession some letters of the plaintiff; but that, as deponent had never seen the plaintiff write, he could not prove to his handwriting. The affidavit further stated, that the deponent made the present application without collusion with any of the parties in the cause, and merely to rectify a mistake into which he had inadvertently fallen in giving his evidence, and for the purpose of justice alone.

The solicitor for the plaintiff also made an affidavit, stating that publication of the depositions had not yet passed, nor any order been obtained for that purpose, and that he had not seen the depositions of any of the witnesses.

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MASTER OF THE ROLLS.—Is there any appearance for the defendant on this motion?

Mr. *Litton*.—No; I believe the defendant does not object. The witness positively swears it is for the sake of justice alone he desires to be re-examined, for the purpose of amending his evidence according to the truth, and such re-examination has been allowed. *Griells v. Gansell* (a); *Kirk v. Kirk* (b). The latter is a very strong case, and exactly in point.

MASTER OF THE ROLLS.—*Kirk v. Kirk* has been much questioned. The re-examination of witnesses has been allowed in certain cases; but I doubt that it has been before publication. However, I will take the affidavits, and look into the authorities.

*Friday, November 30th.*

This day, his HONOR, adverting to the application of the preceding day in this cause, said he had been looking into the authorities upon the subject, and doubted that the present application could be sustained. In addition to the cases already cited, he referred to *Lord Abergavenny v. Powell* (c); *Byrne v. Frere* (d); and desired to direct Mr. *Litton's* attention to them. His Honor further observed, that the case of *Lord Abergavenny v. Powell*, in which Lord Eldon had fully given his opinion, seemed to be a direct authority against the present motion; and that the report of *Byrne v. Frere* was a very short and unsatisfactory note, upon which much reliance cannot be placed, especially as it appears to overrule Lord Eldon's decision in *Lord Abergavenny v. Powell*.

Mr. *Litton*, for the motion, further cited *Gresly's Law of Evidence* (e), where the leading authorities are collected; and it is laid down, that a witness may be re-examined before publication, to amend a mistake caused by inadvertence. He again relied upon *Kirk v. Kirk*, as exactly in point.

Mr. *J. H. Blake*, Q. C., for the defendant, said he had last night received a brief to oppose this motion, and was then ready to do so, if his Honor pleased.—[The MASTER OF THE ROLLS having expressed his readiness to hear Mr. *Blake*]—Counsel proceeded to raise a question as to the *bona fides* of the present application: and contended, upon the authority of *Lord Abergavenny v. Powell*, which, as he said, overruled *Kirk v. Kirk*, that this being an application to amend evidence before publication, must be refused.

(a) 2 P. Wms. 646.

(c) 1 Mer. 150.

(d) 1 Mol. 396.

(b) 13 Ves. jun.

(e) ch. 4. pp. 132-3-4.

*Tuesday, December 10th.*

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Mr. *Litton* reminded his Honor of the application in this case, and begged to know if his Honor would make any order upon it.

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HIS HONOR then read the preceding affidavit of Thomas Knox, and said—I think there cannot be found in the books any authority for the present application, which is on the part of the plaintiff, and a witness who was examined for the defendant, that the witness may be re-examined before publication, and, as appears by his own affidavit, not for the purpose of amending, but of directly contradicting the testimony which he has already solemnly given. For any thing at present appearing to the court, the interrogatories may have been pointed at the very matters which this witness stated upon his examination, and which he now desires to contradict. The cases cited for the motion are not *ad idem*; besides, they are objectionable upon other grounds. The application in this case goes much further than that in *Lord Abergavenny v. Powell*, and I could not grant the present application without overruling Lord Eldon's decision in that case. I must therefore say, no rule.

Mr. *J. H. Blake*, Q. C., asked for the costs of the defendant's appearance upon the motion.—[MASTER OF THE ROLLS. I shall give no costs. When Mr. *Litton* moved, I asked if there was any appearance for the defendant, and was informed there was not.]—It is true, I did not receive my brief until after Mr. *Litton* had moved; but on the next day, when your Honor mentioned the matter, I stated I was instructed for the defendant to oppose the motion, and your Honor was pleased to hear me.

MASTER OF THE ROLLS.—No doubt, I heard you, Mr. *Blake*, and was very glad to receive the valuable suggestions you gave; but I assure you, my mind had been previously made up, that the application could not be granted; and, in this case, I am not disposed to give costs to which, *in strictness*, you are not entitled.

No rule.



Friday, 30th November.

### EXECUTOR—PLEA OF CONFESSION BY—INJUNCTION.

QUIN & others v. BAGNALL & others, executors of HUGH QUIN deceased.

After a decree in administration suit and the court had taken the assets out of the hands of the executors; a creditor restrained from further proceedings at law, although the executors had themselves given a plea of confession for the judgment.

In the foregoing case, the court gave the creditor his costs of opposing the motion to restrain him; as he came in to raise a fair question.

Mr. *Latouche*, on behalf of the defendants, who were executors of the late Hugh Quin, moved for an injunction to restrain Messrs Manders and Powell, and Pim and Co., creditors of the deceased, from proceeding on their judgments. A decree to account had been pronounced on the 12th May, 1838.

Mr. *Haig*, for the creditors Manders and Co., and Pim and Co.—These creditors have obtained two judgments under similar circumstances. They are both judgments entered upon pleas of confession given by the executors themselves. We submit that there is no case to be found, in which, after a judgment at law obtained on the confession of the executors themselves, the court has restrained the creditor from proceeding on his judgment. Here the executors do not come till the stay of execution has expired. The executors, by their plea of confession, have not only acknowledged our debt, but sufficient assets to pay it. *Shelton v. Hawling* (a), *Wheatly v. Lane* (b). We have a right, in case the assets of the testator are insufficient, to go against the goods of the executors. When that is the case, courts of Equity have refused the application for an injunction. In *Brook v. Skinner* (c), Lord Eldon said, if the plaintiff at law has recovered judgment *de bonis testatoris*, the court will award an injunction; but if the judgment be *de bonis propriis*, the executors cannot have an injunction. In *Clarke v. Ormonde* (d), Lord Eldon said, that if the creditor has obtained a judgment by which the executor is personally liable, the court has nothing to do with it. In *Terwest v. Fetherly* (e) the executor in an action on a bond had pleaded *non est factum* and *plene administravit*; and judgment having been obtained against the executors on both these pleas, Lord Eldon refused to restrain the creditors and said the court had never interfered in such a case. In *Drewry v. Thacker* (f), Lord Eldon gave his opinion, that there was no instance in the history of the court of Chancery, where after a judgment at law *de bonis testatoris et si non de bonis propriis*, the court had awarded an injunction on a decree, being subsequently obtained for an administration of assets. In a very late case, *Lee v. Park* (g), Lord

(a) 1 Wells. 258.

(c) 2 Mer. 431.

(e) 2 Mer. 480.

(b) 1 Saund. 219. G.

(d) Jac. 124.

(f) 3 Swanst. 542.

(g) 1 Keen, 714.

Langdale refused a motion to restrain a creditor after a decree in an administration suit, from issuing execution on a judgment obtained *de bonis testatoris et si non* as to the costs *de bonis propriis*. Our case is stronger than any of these, the nature of our judgments being, that in the event of a deficiency of assets, we are entitled to go against the goods of the executors. The court will not deprive us of any part of our security.

Mr. *Latouche*.—This question has already been fully discussed and decided in this court, in *Egan v. Baldwin* (*h*). There the late Master of the Rolls said, “An administrator, against whom there is a decree “to account, is, in all cases, entitled to an injunction against a creditor “who proceeds at law, except when he puts in a plea which he knows “to be false.” Now, in this case, the executor acted precisely as he ought, by giving a plea of confession when the debt was a fair one, and not disputed. All we seek is to restrain these creditors at law, and make them come into the Master’s office. The executors swear, in their affidavit, that they have no assets in their hands, the whole having been paid into court. There is an abundance of assets standing to the credit of the cause, and the debt of these creditors will certainly be paid. The case of *Bookless v. Crummack* (*i*) shews that we are entitled to restrain the creditors, notwithstanding the nature of their judgment; and that they are not entitled to the costs of the motion. *Curre v. Bowyer* (*k*).

Mr. *Haig*.—As to the case of *Egan v. Baldwin*, just now cited, the observation of the late Master of the Rolls, read by Mr. *Latouche*, was made on the first hearing of the case; but, on a subsequent day, when giving final judgment in the case, his Honor varied very much from his former opinion, saying, that the cases on the subject were quite irreconcilable; and he decided that case on its special circumstances, without laying down any principle whatever. That case can be no authority for the present application. That was a judgment by default, and the late Master of the Rolls raised a special equity on that circumstance. But here is a deliberate plea of confession by the executors, with a stay of execution, and after that has expired, they come to this court for an injunction. The cases are collected in *Will. on Ex.* (*l*). That work treats the matter as undecided; but, on comparing all the authorities, it will be found that the court has gone the length of restraining a creditor who has obtained a judgment *de bonis testatoris et si non*, as to the costs only, *de bonis propriis*; but has never gone the length of restraining a creditor whose judgment was available, both for debt and costs, against the goods of the executor.—As to the costs of this motion, in

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(*h*) 1 Hog. 195.

(*i*) Cooper’s Reports in 1837-8, p. 125.

(*k*) 3 Mad. 458.

(*l*) p. 13.

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case the court should decide on restraining us, *Jones v. Jones* (m) is decisive as to the practice.

His HONOR said, that as to the costs of the motion to restrain a creditor, there were cases both ways. As to the question, whether the creditor should be restrained in the present case, he would look into the cases cited before he made his order; but was disposed to think, that in the cases where the injunction had been refused, the court had not taken the assets out of the hands of the executor.

*Monday, December 3d, 1838.*

MASTER OF THE ROLLS. This is a motion by the defendants for an injunction to restrain certain creditors from further proceeding at law. The bill in this cause was filed by legatees against the defendants, as executors of the late H. Quin, for an administration of assets. By an order made in the cause, the assets of the testator were ordered to be sold by auction, and the money brought into court. The whole of the assets have been brought in and lodged in court; and the executors swear, in their affidavit, that they have no assets in their hands. The plaintiffs at law were creditors by simple contract of the testator, and, having brought their action, the executors, in April last, gave a plea of confession. On the 12th May, there was a decree to account in this cause. It is contended, on behalf of the creditors, that the judgment on a plea of confession by the executors, being *de bonis testatoris et si non de bonis propriis*, this court will not restrain the creditors. Several cases were cited in support of that position, and amongst them *Lee v. Park* (n). I am of opinion, that the present case is distinguishable from the cases cited for the creditors, by the circumstance that the court has taken all the assets out of the hands of the executors. In *Lee v. Park*, the executor had the whole of the assets under his control; and I do not think this case, where the executors have given a plea of confession, is distinguishable from the case of a judgment by default; in which, according to the authority of *Dyer v. Kearsley* (o); *Fielden v. Fielden* (p), and *Egan v. Baldwin* (q), the court will restrain the creditors. *Bookless v. Crummack*, in Cooper's Reports, is also an authority for an injunction in this case. I shall follow the form of the order in *Dyer v. Kearsley*. The creditors will be entitled to their costs at law up to the time they had notice of the decree; and as to the costs of the motion, the creditors having raised a fair question for the consideration of the court,

(m) 5 Sim. 678.

(o) 3 Mer. 483.

(n) 1 Keen

(p) 1 S. & Stu. 255.

(q) 1 Hog. 195.

I shall give them a small sum as the costs of this motion.

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The order was as follows :—

Restrain the creditors from proceeding at law on the judgments obtained by them ; and let them be at liberty to prove their demands under the decree in this cause, together with the costs incurred at law, up to the time when they had notice of the decree ; and let them have £4 for the costs of appearing on this motion.

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*Saturday, December 8th.*

TITLE DEEDS, BRINGING IN OF, SOLICITOR'S LIEN ON.

PLUMTRE v. O'DELL.

Mr. WM. BROOKE, Q. C., with whom was Mr. E. H. BURROUGHS, on behalf of the plaintiff, moved that the defendant, Geo. Hewson, should bring in a certain deed, bearing date July, 1798, admitted by his answer to be in his possession.

This deed had got into the possession of Mr. George Hewson, as solicitor for the defendant John O'Dell, who was representative of Wm. O'Dell, a mortgagee of the lands in the pleadings mentioned. The mortgage debt had been paid off, and the mortgage decreed to be re-conveyed, but never was re-conveyed. The plaintiff in this cause had a decree for a sale, but could not make title without this deed, and therefore filed a bill, in the nature of a supplemental bill, against Mr. Hewson, to get in the deed, and now moved upon his answer.

Mr. H. Graves, for the defendant, insisted that the order now sought should not be granted. The plaintiff should have applied against the defendant, John O'Dell, who could not have got rid of an attachment for not bringing in a deed, as the possession of the solicitor is the possession of the client. *M'Cann v. Beere (a)*. The defendant, O'Dell, would thus have been obliged to pay the costs due to Mr. Hewson, who might have demurred to a bill filed against him, for the sole purpose of obliging him to bring in a deed of his client, and on which he has a lien. The plaintiff should proceed to hear his cause, and not thus endeavour to obtain, by motion, the entire relief sought by his bill.

There being a decree for a sale, and the solicitor of one of the defendants, a mortgagee who had been paid off but had not reconveyed, having the mortgage deed in his possession, being made a party by supplemental bill, and having admitted, by his answer, that he held the deed, having a lien thereon for costs incurred by the mortgagee, his client ;— on motion by the plaintiff against the solicitor, Ordered, that the solicitor should bring in the deed, without prejudice to any

claim he might have against his own client

(1) 1 Hog. 129.

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Mr. E. H. Burroughs, in reply.—The question now before the court is not upon demurrer; nor is the present application, as in *M'Cann v. Beere* (a), against a defendant in the original cause and his solicitor; but here, we move on the answer of Mr. Hewson, who has submitted to answer, and could not have avoided answering; for a bill of this kind may be filed, where, as in this case, the solicitor will not deliver the deeds to his client. *Fenwick v. Reed* (b). The objection, that the plaintiff should raise the question at the hearing, would, if yielded to, only prejudice the plaintiff by the delay, but could not benefit the defendant. In annuity causes, where the main object of the suit is, not a sale, but to get a receiver, a receiver is constantly appointed upon motion. In a recent case, in which Mr. Gayer was counsel, in the Exchequer,\* the court, upon motion, ordered the solicitor to bring in title deeds.

But the business for which Mr. Hewson claims this lien was done, not for the inheritor, but for a mortgagee, who has long since been paid off, and who, being a defendant in the original cause, might have proved his demand, if any he had, and is bound by the decree to bring in his deed. He could not give to his solicitor a better title than his own. *Furlong v. Howard* (c); *Marsh v. Bathoe* (d); *Brassington v. Brassington* (e); *Hutchinson v. Joyce* (f).

The MASTER OF THE ROLLS, by his order, declared that Mr. Hewson had no lien on the deed, as against the plaintiff; and ordered him to bring it in within three weeks, without prejudice to his lien as against any other party.

(a) Hog. 129.

(c) 2 Sch. &amp; Lef. 115.

(e) 1 Sim. &amp; Stu. 457.

(b) 1 Mer. 121.

(d) Ridg. Cas. Temp. Hardwicke, 256.

(f) 5 Law Rec. N. S. 37.

\* *Little v. Storey*, Eq. Ex. Nov. 1836, not reported. In this case, the attorney, being made a defendant, in consequence of his possession of title deeds, was ordered to bring them in, to make out title under the decree for a sale, with-

out prejudice to his lien, which it was ordered he should have against the purchase money of the estate, when sold.—*Ex relatione*.

See also *Tomb v. Orr*, 6 L. R. N. S. 40.

## EQUITY EXCHEQUER.

### TITHE COMPOSITION—RENT CHARGES UNDER 1 & 2 VICTORIA, c. 109.

#### GENERAL ORDER.

Friday, 30th day of November, 1838.

WHEREAS by a General Order, bearing date the first day of December, 1836, provision was made for the Tithe Composition, in the several cases in said Order mentioned (a).

AND WHEREAS, by an Act of Parliament, passed in the 1st and 2d years of the reign of her present Majesty Queen Victoria, c. 109, Compositions for Tithes, in Ireland, have been abolished, and Rent-charges have been substituted in lieu thereof, IT IS THEREFORE ORDERED, That the several provisions contained in said Order, bearing date the first day of December, 1836, relative to Tithe Compositions, be applied to Rent-charges under the said Act (b).

(a) See this Order, 6 Law Rec. (2d Series,) 36; and Lowry's Fq. Ex. Rules, p. 155.

(b) In the court of Chancery a similar Order has been made, for which see 1 Drury and Walsh, 459.

—◆—  
*Thursday, 22d November.*

### PRACTICE—RECEIVER, UNDER 5 & 6 W. 4, c. 55— TENANT FOR LIFE.

In the Matter of EVANS, Petitioner; v. BLENNERHASSETT, Respondent;  
And in several other Matters, wherein the same person was Respondent.

Mr. HUGHES, for the respondent, moved that the consent in these matters, which was signed by the attornies for the respective petitioners, should be made a rule of court. The object of the consent was, that an

A provision will be allowed for the maintenance and support of a tenant for life, over whose estate a receiver has been appointed under the 5 & 6

W. 4, c. 55; but such provision will be made by discharging the receiver from over so much of the land as will give the respondent a sufficient income, and not by directing the receiver to pay him a specific portion of the rents.

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order made on the 19th of November, 1836 (a), should be renewed, and that accordingly the receiver (who had been appointed in the first, and extended to the other matters, under the 5 & 6 W. 4, c. 55) should continue to pay the respondent the sum of £200, yearly, for his maintenance and support, together with the arrears now due.

The respondent is tenant for life, and it has been frequently stated, both by this court and the court of Chancery, that it was not the intention of the Legislature, in passing the above act, to deprive tenants for life, and inheritors, of the means of subsistence; besides, in this case, there is the consent of the parties interested.

RICHARDS, B.\* It is certainly reasonable that a tenant for life should have some provision made for him, but I do not see why there should be a receiver over an estate to pay the rents of it to the owner, nor why the respondent should be protected from the claims of future creditors by the present proceedings. The better way is to discharge the receiver from so much of the lands as will give the respondent £200 a-year. Therefore,

Let the consent be received, and, in execution thereof, refer it to the Chief or Second Remembrancer to settle a rental of a part of the lands in the petitions mentioned, which will amount to £200 a year, or as near thereto as possible; and, thereupon, let the receiver appointed in these matters be discharged from the part of said lands included in said rental; and let the respondent be at liberty to receive the rents thereof.

\* The Chief Baron, Pennefather, Baron, and Foster, Baron, were sitting in the court of Error.

*Monday, 3d November.*

#### COSTS—CO-DEFENDANTS—JUDGMENT—DEVISEE.

HALES v. KIRBY.

Where a  
bill was filed  
by a judgment  
creditor

against three persons as devisees of certain lands liable to the judgment debt—*Held*, that one of the defendants who had paid his proportion of the debt before the filing of the bill, was entitled to his costs as against his co-defendants by whose default the suit was rendered necessary.

The bill in this case was filed by the plaintiff, as a judgment creditor of Lawrence Kirby, deceased, against the defendants, John Kirby,

(a) That order was made in the first matter, on the application of the respondent, and was in the following terms: "The petitioner not

"objecting, let the receiver pay to  
 "the respondent £200 a-year, from  
 "the time of his appointment until  
 "further order.

Patrick Kirby, and George Kirby, sons of the said Lawrence Kirby, who had devised his freehold property equally between them.

The defendant, John Kirby, had from time to time, and before the filing of the bill, paid to the plaintiff various sums on account of the judgment, exceeding, in the whole, the one-third of the entire amount of the debt.

A receiver had been appointed over the two-thirds of the lands which belonged to Patrick Kirby, and George Kirby. The cause now came on to be heard upon report and merits.

Mr. *Hawkins*, for the defendant John Kirby, submitted that as his client had paid his proportion of the debt before the filing of the bill, he ought to be indemnified against the expenses of the suit, by having his costs paid out of that part of the property which belonged to his brothers, through whose default the suit had been rendered necessary.

Of this opinion were the COURT, and decreed a sale, in the first instance, of the two-thirds of the lands belonging to Patrick and George Kirby, for the payment of the plaintiff's demand and costs, but the sale not to take place without further order, so that the plaintiff's demand might be paid by the receiver; John Kirby's costs to be paid out of the proceeds of the sale, or by the hands of the receiver, after the payment of the plaintiff's demand and costs. In the event, however, of the two-thirds of the lands not proving sufficient to discharge the debt due to the plaintiff, the remaining third which belonged to John Kirby, to be sold to make up the deficiency.

—◆—  
*Wednesday, 5th December.*

#### PRACTICE—AFFIDAVIT TO GROUND ATTACHMENT FOR NON-PERFORMANCE OF DECREE.

FLEURY *v.* MURPHY.

Mr. *Walter Bourke* moved for a conditional order for an attachment against the defendant, for non-performance of the decree in this case. The affidavit stated that the defendant had been served with an attested copy of the decree, and also with an injunction for the payment of the sum decreed due, and a subpoena for the costs; and that a personal demand of the amount of the decree and costs had been made by the deponent, who, at the same time produced and offered to give

a power of attorney, must state that the power of attorney was produced to the defendant at the time of making the demand.

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*v.*  
KIRBY.

An affidavit to ground an attachment for non-performance of a decree for the payment of money which has been personally demanded from the defendant under and shewn to



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the defendant receipts for the sums so demanded. The affidavit further stated that the deponent had acted in pursuance of a power of attorney, executed by the plaintiff.

PENNEFATHER, B. The affidavit does not state that the power of attorney was produced and shewn to the defendant, at the time of making the demand. This is necessary, and as the affidavit is defective in that respect,  
 No rule on the motion.

*Wednesday, 5th December.*

PRACTICE—COSTS OF APPOINTING A RECEIVER  
 UNDER 5 & 6 W. 4, c. 55.

STANLEY, Petitioner; v. BOND, Respondent.

A judgment creditor who has obtained the appointment of a receiver under the 5 & 6 W. 4, c. 55, is entitled in this court to a reference to the Remembrancer to ascertain the amount of costs properly incurred in appointing such receiver, and to an order on the receiver to pay the amount out of the funds in his hands, for which he is to have credit in passing his account.

Mr. T. K. LOWRY moved, on behalf of the petitioner, for a reference to the Remembrancer to ascertain the amount of costs incurred by the petitioner, in obtaining the appointment of the receiver in this matter, and that the receiver should pay the same to the petitioner, or his attorney, out of the funds received by him, and that he should have credit for the same on passing his account. The motion was grounded on the affidavit of the petitioner's attorney, which stated, that the receiver in this matter was appointed on the 13th July, 1837, over certain lands and premises in the county of *Armagh*, in the petition mentioned, pursuant to the provisions of the 5 & 6 W. 4, c. 55, for the purpose of paying off the amount of a judgment obtained by petitioner against respondent, for the sum of £500; that the receiver had collected a sum of £120, or thereabouts, which he had then in his hands; that he was about to pass his account before the Remembrancer, and that he was willing to pay to the petitioner, out of said sum, the amount of costs incurred by him, in proceeding to obtain such receiver, provided he should be allowed credit for the same in passing his said account.

*Per Curiam.\**—Refer it to the Remembrancer to ascertain the amount of the costs properly incurred by the petitioner in obtaining the appointment of the receiver; and let the receiver pay the same to the petitioner, or his attorney, and have credit for same on passing his account (a).

\* The Chief Baron, and Pennefather, Baron.

(a) See the case of *Rogers v. Cusack* in the Rolls—5 Law Rec. (2d Series,) 226.

# C A S E S

## IN THE

### COURTS OF CHANCERY, ROLLS, AND EQUITY EXCHEQUER.

#### CHANCERY.

*Saturday, November 3rd.*

NANGLE v. SMITH.

This was a suit for a further renewal of a lease granted in the year 1672, and to have that lease declared a lease of lives renewable *for ever*.

The defence made was, that the lease of 1672, contained no covenant *for perpetual* renewal; and also that encroachments had been made on other lands under color of that deed, to a large extent, which encroachments plaintiff ought, at all events, to give up, before he could have specific performance of that covenant even if there were any such in the lease.

The questions discussed at the hearing (which lasted for six successive days), were, *first*, whether certain words, admitted to have been contained in the lease of 1672, amounted to a covenant for perpetual renewal.

*Secondly*, whether that lease (which was now lost,) did in fact contain any other covenant which rendered it renewable for ever.

*Thirdly*, supposing that not to have been the case, whether there was a *parol* agreement at, or previously to, the making of the lease, that it should be renewed from time to time for ever—The year 1672, being before the statute of frauds.

A lease made before the statute of frauds and now lost, being proved to contain an agreement as to the amount of fine to be paid "upon the renewing of any life or lives," and having been seven times since renewed, an *issue* was directed to try whether at or before the making of the lease there was an agreement for a lease of lives renewable *for ever*. And a second *issue* to try whether

such lease contained any clause or covenant relating to renewal independent of the stipulation as the amount of fines. — *Post* 140.

If a lease contain a covenant whereby the parties agree, "that on the renewing of any life or lives, a fine of £16. 16s. 4d. for each life, shall be paid by the lessee, his heirs or assigns, to the lessor, his heirs or assigns," such words by themselves, do not amount to a covenant for perpetual renewal. — *Post* 137, 138.

The acts of tenant for life, done while in possession, are evidence against remainder-man. — *Post* 137.

A bill in chancery, filed by tenant for life, though no decree was pronounced in the cause, may be read in evidence in a suit against remainder-man, partly relating to the same lands, but only as evidence of such a bill having been filed — *Post* 126.

*Quere*.—If tenant for life make a lease for lives in pursuance of a subsisting covenant for perpetual renewal and dies—has the lessee in such lease a good defence *at law*, to an ejectment, by remainder-man who has succeeded to the estate? — *Post* 133.

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*Fourthly*, whether the last question, (as to the *parol* agreement), was open to the plaintiffs on the pleadings as framed, or at all, where there had been a written instrument.

*Fifthly*, whether under color of the lease of 1672, the lessee or his representatives from time to time had, or had not, encroached on other neighbouring lands, not comprised in the original lease.

The plaintiffs were John Hyacinth Nangle, Richard Moore O'Ferrall and Gerald Dease, and the defendants were the Rev. Thomas Smith, Francis Smith, James Gibbons, jun., Rev. Robert Packenham, and Thomas James Smith, a minor.

Original lease  
24th May,  
1672.

The facts were as follows :—The lease which was now lost, and the contents of which were disputed in the suit, was made on the 24th May, 1672, between Henry Packenham of the one part, and Bartholemew Cooper of the other. By this lease it was admitted, that Henry Packenham demised to Bartholemew Cooper, certain lands called Mayne, and also, certain lands called Fiermore, (which latter were not in question in this suit), *to hold* for the lives of Bartholemew Cooper, Apollina Cooper, and Bartholemew Cooper the younger, and the survivor of them. The loss of this lease, and also of other deeds afterwards mentioned, was accounted for by the family residence of the plaintiff having been burned in the troubles of 1756, with all the papers and documents therein.

In this lease, or by indorsement on it, (it did not appear which,) it was admitted, were these words :—“ And it is hereby agreed between “ the parties aforesaid, that upon the renewing or inserting of any life or “ lives, there shall be paid by the said Bartholemew Cooper, the father, “ his heirs or assigns, unto the said Henry Packenham, his heirs or “ assigns, the full sum of £16. 16s. 4d., current and lawful money of “ England.”

The lessee's interest in the above lease was sold for valuable consideration to the ancestor of Nangle, the principal plaintiff, and the lessor's interest had also been sold for valuable consideration to Thomas Smith, (called in the argument, Thomas Smith the first) the ancestor of Smith the principal defendant.

Thomas Smith the first, died about 1712.

Suit for re-  
newal in 1713,  
1716.

It also appeared that, in the year 1713, a bill had been filed in this court for the renewal of this lease, by the ancestor of the plaintiff, against Thomas Smith the second, and a decree for a renewal pronounced, without deciding the question of *perpetual* renewal. The proceedings in that cause were read in evidence, and the parts which were relied on by the contending parties were,

- 1st. The statements of the plaintiff in that suit relative to the lease.
- 2nd. The answer of the defendant in that suit.
- 3rd. The depositions of certain witnesses in that cause.
- 4th. The notes of the hearing in the Registrar's book.
- 5th. The decree in that cause.

The ancestor of the plaintiff, by the bill of 1713, alleged that Henry Packenham, the lessor, "did about the — day, of May, 1672, "(the precise day was left blank,) come to a treaty and agreement with "Bartholemew Cooper, now deceased, to make him a lease for lives "renewable for ever, and afterwards, on the 24th May, 1672, in pursu- "ance and performance of said agreement, by deed demised the said "lands to Bartholemew Cooper, his heirs and assigns, for and during "the term of three lives, viz., &c., at the rent, &c., as in and by the "said indented deed of lease, now in your suppliant's custody, ready to "be produced, may appear. Your suppliant further sheweth, that it "was concluded and agreed by and between the said Henry Packen- "ham, and the said Bartholemew Cooper, sen., before and at the time "of making the said lease for lives, that the same should be renewable "for ever, by the said Cooper, his heirs and assigns, on the payment of "£16. 16s. 4d., which the more plainly appears, by its being mentioned "and expressed in the said deed of lease, that it is thereby agreed by "and between the said Henry Packenham, and B. Cooper, that upon "renewing or inserting any life or lives, there should be paid by the said "Barth. Cooper, his heirs or assigns, unto the said Henry Packenham, "his heirs or assigns, the full sum of £16. 16s. 4d., and that it was in "confidence of said lease being a lease of lives renewable for ever, that "the said B. Cooper accepted thereof, or agreed to pay so much rent "thereout."

The same bill (amongst the pretences,) also stated as follows, "the said "defendants pretending that they are not obliged by the said covenant or "agreement in the said lease, to renew to your suppliant, in regard the "said agreement is not more fully or skilfully worded; whereas the said "defendants well knew that it was the agreement and intention of the "parties to the said lease that the same should be renewable for ever, "and that it was always deemed and reported in the country to be a "lease renewable."

The bill of 1713 also contained this passage—"In tender consideration "of the premises, and for as much as your suppliant is properly relievable "therein by the equity of this honorable court, in regard that by the "manner of wording the covenant or agreement mentioned in said deed "of lease, your suppliant cannot have an action at law to compel the "said defendants to renew said lease, though it plainly appears by the "said lease, that it was the intention and meaning of the parties thereto, "that the same should be a lease of lives renewable."

The bill of 1713 also contained a suggestion that the person who drew the lease was an unskilful person and "unacquainted with the terms "or manner of drawing leases for lives renewable."

And that bill merely prayed in general terms, "that your sup- "pliant may be relieved in the premises according to equity and "conscience."

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*Statements  
in bill of 1713*

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*Answer of  
defendant in  
suit of 1713,  
1716.*

*Depositions in  
suit of 1713,  
1716.*

The answer of Thomas Smith, the defendant in that cause, admitted that a covenant in the words above mentioned (p. 120 *ante*) was contained in the lease of 1672, and in a subsequent part of his answer, said he had heard, and believed, that there was no other clause than what is aforementioned in the said lease, but admitted that he had lately heard, from several in the county, that they heard it was a lease for lives renewable for ever, but upon what grounds they went, or whether it was because the plaintiff and his friends so gave it out, he knew not.

The depositions taken in that suit in 1713-16, were also read in evidence. The material parts were the following:—

Rev. Robert Packenham, to the third interrogatory in that cause, deposed, amongst other things, “that he, deponent, sold the lands of Mayne, to Thomas Smith, as a lease of lives, subject to renewal; and that deponent heard that the general reputation in the county and neighbourhood was, that the said lease was renewable, and that the said Thomas Smith told him, deponent, when he was selling the said lands to said Smith, that the said lease was renewable.”

Anne Packenham, (widow of Henry Packenham, the lessor,) deposed, to the third interrogatory in that cause, “that she knew nothing of the treaty of a lease between Henry Packenham and Bartholemew Cooper, at or before the making of such lease; but saith, the deed now produced is signed by the proper hand-writing of her said husband, and the witnesses thereto are dead; and believes that the said lease was made by her said husband, to the said Bartholemew Cooper, with an intention to be renewable for ever; the reason of her belief is, that her said husband had a particular regard for the said Cooper's integrity and service to him, and intended the said lease for the said Bartholemew Cooper's good, and that she, this deponent, having some discourse with her said husband, in relation to the said lease, he told her with some warmth, that the said lease was renewable for ever, or words to that effect; and believes the said Bartholemew Cooper well deserved said lease, on account of his honesty and integrity in her said husband's service; and the said lands were sold by the Rev. Robert Packenham, son of deponent and her said husband, to Thomas Smith, deceased, and believes that the said lease was generally reported in the neighbourhood as a lease renewable.”

Anne Beatty (daughter of Henry Packenham, the lessor), to the third interrogatory in that cause, stated, that “She believes all the body of the said lease is the proper hand-writing of Andrew Williams; that she never heard that the said Andrew Williams was a person skilled in drawing leases, but that she knew him to be a parish clerk; that she heard her father say the said lease was for lives renewable, and heard him say, several years after the death of said Apollina Cooper, (one of the lives in the original lease,) that he wondered that the now

"plaintiff did not renew his lease, by putting in a new life instead of the said Apollina Cooper."

Edward Packenham (grandson of lessor,) deposed in that cause, that "He believes Andrew Williams was a parish clerk, and no ways skilled in drawing leases, and that he believes it was the intent of the said Henry Packenham and Bartholomew Cooper that the said lease should be for lives renewable for ever."

The notes of the hearing in that cause were also read. The parts relied on as material are here stated.

"Mr. Solicitor, for defendant.—There is no covenant of renewal in the lease.

"Lord Chancellor.—I am of opinion, upon the evidence in this cause, that plaintiff is entitled to a renewal.

"Mr. Attorney, for the defendant, saith the plaintiff hath lain by, and let two of the lives to drop; and had plaintiff renewed in time, several lives might have fallen.—Mr. French saith one of the lives fell 40 years ago, and the other fell 20 years ago.

"Lord Chancellor.—Will the defendant consent to accept of the money that is to be paid for the two renewals, and that a reasonable time may be limited for the renewal for the future? if not, I will give judgment in it. Let the defendant consider of this proposal till to-morrow."

"MONDAY, NOV. 26, 1716.—NANGLE v. SMITH.

"Cause called.—Mr. Solicitor. My client is not willing to accept of the proposal. Lord Chancellor. I am of opinion that the plaintiff is entitled to a renewal of the lease, paying the fines according to the covenant in the lease, and therefore I decree it accordingly."

"Court.—Read the lease. The lease read, dated the 24th May, 1672, between Henry Packenham and Bartholomew Cooper. Mr. Malone, for plaintiff. There is an interlineation in the lease of Sir Thomas Packenham's own hand, and an indorsement."

"Court.—The defendant is to renew to the plaintiff for the two lives that are dead, at the price of £16. 4s. for each life; but I do not decree that it is a lease for lives renewable for ever, but leave the plaintiff at liberty to take his remedy for to sue for a renewal after the termination of the three lives. Mr. Malone. We are willing to pay all the rent, without any deduction, and all the fines, if they will renew for the two lives, and give us a clause of renewal for ever, upon paying of the fine within six months after notice of each life, and the decree to be without costs on either side. Court. Let the defendant consider of this proposal till to-morrow."

"THURSDAY, NOV. 27, 1716.—NANGLE v. SMITH.

"Sir Richard Levinge, for plaintiff, does not agree to the last proposal. Mr. Geering, for defendant, is willing to agree to the proposal made by Mr. Malone, and is ready to sign the book. Sir Richard Le-

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Notes of  
hearing before  
Lord Middle-  
ton, in 1716.

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Lord Mid-  
dleton's decree  
in Nov. 1716.

Interroga-  
tories in suit  
of 1713-16.

First renew-  
al, 8 April,  
1719, Thomas  
Smith 2 to  
Garrett Nan-  
gle.

Second re-  
newal, 5 May,  
1752, Thomas  
Smith 2 to  
Garrett Nan-  
gle.

"vinge prays the judgment of the court. Court. Decree the plaintiff  
"a renewal for two lives, paying the price for each life, and refer to  
"apportion the rent and fines, as in the bill between the lands of Mayne  
"and Fiermore, without costs of either side; but the court declares  
"that they do not establish this as a lease for lives renewable."

The decree in that cause was read in evidence; it was without any material variation in pursuance of the notes. It recited, that the plaintiff had receded from the proposal made by Mr. Malone on the 26th of November (see *supra*), and decreed according to the directions above stated, except that the concluding words were as follows: "And his Lordship is pleased to declare that he did not establish that the said lease was a lease for lives renewable, or not." The words "or not," it was remarked, were not in the notes.

Several of the interrogatories which had been exhibited to the witnesses in that suit were read on behalf of the now defendants, with a view to shew that the case sought to be made in that suit was, that the covenant for perpetual renewal had been omitted by a blunder of the person who drew the lease, or that he intended the covenant, admitted to be contained in it, for a covenant for perpetual renewal.

In pursuance of that decree of 1716, a renewal was executed by Thomas Smith the second (the defendant in that suit), dated 8th April, 1719. This deed was registered. The memorial (which was only executed by the lessee), stated that it was annexed to a lease for lives renewable for ever, dated 24th May, 1762; and that in pursuance of the decree of the court of Chancery, Thomas Smith demised to Garrett Nangle, "part of the lands of Mayne, being 148 acres of profitable land, and 23 acres and 12 perches of unprofitable, plantation measure, be the same more or less," for the lives of Bartholomew Cooper (the remaining life in former lease), Thomas Nangle, and Patrick Cashell, and the survivors or survivor of them.—(The two latter were the new lives inserted in pursuance of the decree of 1716.) This was the *first* renewal of the lease of 1672.

On the 5th May, 1752, the last life in the original lease having fallen, the same Thomas Smith, the defendant in the suit of 1713-16, executed another renewal to Garrett Nangle. Thus, all the lives in the original lease of 1672 had been renewed, and the new lease of 1752 contained three lives, none of whom were in the original lease. This deed was also lost. The memorial (which was executed both by lessor and lessee,) stated, that "in the same indenture it was agreed between the parties thereto, that upon the renewing of any new life or lives, there should be paid by the said Hyacinth Nangle, his heirs or assigns, and the said Thomas Smith, his heirs or assigns, the full sum of £14. 7s. 8½d., current and lawful money of England." This was the *second* renewal.

[The above fine, £14. 7s. 8½d., was the apportioned fine payable for Mayne alone; the original fine of £16. 16s. 4d., mentioned in the original lease of 1672, having been payable in respect of Mayne and Fiermore. The latter denomination had not been purchased by the Smiths, but remained in possession of the Packenhams.]

On the 2d March, 1754 (another life having fallen), the same Thomas Smith the second executed a further renewal of the said lands of Mayne, to Hyacinth Nangle. This was the *third* renewal.

Some time in 1764, Thomas Smith the second died, and was succeeded by his nephew, Thomas Smith the third, who was next remainderman in tail under the Smiths' family settlement, the said Thomas Smith the second having been only tenant for life.

On the 2d April, 1768, Thomas Smith the third executed a further renewal to Christopher Nangle. Previous to the execution of this lease, the lessor, Thomas Smith the third, had suffered a recovery, and resettled the lands, in pursuance of a covenant contained in his own marriage settlement, and, at the time of granting this lease, was therefore merely tenant for life. This lease purported to be in pursuance of a covenant for renewal in the said original lease; and then recited the words of the covenant admitted to have been in that lease.—See the words, *supra*, p. 120.—This was the *fourth* renewal.

On the 25th December, 1768, another life having fallen, Thomas Smith the third executed a further renewal to Christopher Nangle. This deed recited the demise of 1672, and recited, that in that indenture it was agreed between the parties, that "upon the renewing or inserting of any life or lives, there should be paid by the said B. Cooper, his heirs or assigns, unto the said Henry Packenham, his heirs or assigns, the full sum," &c., following the words of the covenant admitted to have been contained in the original lease; and purported to be in pursuance of the covenant for perpetual renewal in the original lease contained. This lease of 25th December, 1768, was the *fifth* renewal.

In July, 1774, Thomas Smith the third filed a bill in this court, for ascertaining boundaries, against his tenant Nangle, which bill was amended in 1779, and stated, among other things, "that Henry Packenham, deceased, by deed of the 24th of May, 1672, demised, as is alleged, to Bartholomew Cooper, a part of said lands, by the description "of part of Mayne aforesaid, being 148 acres of profitable land, and 23 acres and 12 perches of unprofitable land, for three lives therein mentioned, with covenant for perpetual renewal, as by the said article, "in the custody or power of the confederates, would more fully appear."

The bill of 1774 then stated that another lease, for 21 years, of certain other lands, called Upper and Lower Coole, *adjoining the lands of*

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*Third renewal, March, 1754, Thomas Smith 2 to H. Nangle.*

*Fourth renewal, 2 April, 1768, Thomas Smith 3 to C. Nangle,*

*Fifth renewal, 25 Dec. 1768, Thomas Smith 3 to C. Nangle.*

*Suit of 1774, to ascertain boundaries.*

*Statements in Smith's bill of 1774.*



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"*Mayne*, had been made to Hyacinth Nangle ; and that the Nangles had, "by slow and imperceptible gradations, from time to time, gradually "suffered to go to ruin the ancient mearings that formerly divided the "lands of *Mayne* from the lands of *Coole*, and had gradually encroached "upon the said lands of *Coole*, wherein they had but a determinable interest, and added to the said lands of *Mayne*, wherein they had a "perpetual interest as aforesaid, several acres of the said lands of *Coole* ; "and the lease of the said lands of *Coole* having expired on or about "the 6th day of April, 1773, your suppliant obtained possession of the "part of those lands which had not been unfairly annexed to the lands "of *Mayne* aforesaid." This bill prayed a commission of perambulation to ascertain the boundaries.

Bill filed by  
tenant for life  
read in evidence  
against  
remainder-  
man, though  
no decree was  
made post,  
131.

[The reading this bill in evidence was objected to by Mr. *Warren*, for the defendant, there having been no decree in that cause ever pronounced, and the words of a bill, under such circumstances, only being looked on as the words of the counsel who drew it ; but the Lord Chancellor overruled the objection, saying he merely admitted it as evidence that such a bill was filed at that period.]

The principal defendant in the suit of 1774-79 was a minor. No decree was ever made ; and when he came of age, the boundaries were settled by arbitration, in the year 1782.

Afterwards, Thomas Smith the third died, and was succeeded by Thomas Smith the fourth, as next in remainder.

*Sixth  
renewal.*

On the 16th February, 1806, Thomas Smith the fourth executed a further renewal of the lands of *Mayne* to Nangle. This was the *sixth* renewal.

*Seventh  
renewal.*

And on the 12th August, 1820, Thomas Smith the fourth executed a further renewal of the said lands to Nangle. This was the *seventh* and last renewal.

Thomas Smith the fourth, having died, and the present defendant Thomas Smith the fifth, having succeeded to the estate as remainder-man under the family settlements, on the 26th of October, 1831, served notice on the plaintiff Nangle, requiring him to give up possession of those parts of the lands of *Mayne*, which the defendants contended had been encroached upon by the Nangles, and were not contained in the original lease ; and this notice added, that if Mr. Nangle refused so to do, Mr. Smith would decline to execute any renewal of the said lands.

This notice was answered by the plaintiff Nangle, denying that he, or those from whom he derived, had made any encroachments, and referring to the settlement of boundaries in 1782. Several other notices were served by the parties on each other, and a draft deed of renewal was tendered by Nangle to Smith, for execution, and declined by Smith.

The original bill in the present suit, filed 28th November, 1836, and amended on the file 23d June, 1837, stated, amongst other things, "That in the said indenture of lease of 1672 was contained a covenant "on the part of said Henry Packenham, for himself, his heirs and assigns, with the said Bartholomew Cooper, his heirs and assigns, for "the perpetual renewal of the said lease, as by the said original lease, "which has been destroyed, had the plaintiff the same to produce, "would appear, and as appears by a recital thereof in an indenture of "the 25th day of December, 1768, hereinafter set forth."—[See the recitals in that deed, *ante*, p. 125.]

And the bill prayed, "that the covenant for renewal contained in the "said original lease may be decreed to have been a covenant for perpetual renewal, and that the plaintiffs may be decreed to have the "said original lease renewed to them, on payment of the rent and "fines, pursuant to the covenants in said original lease contained, &c.," and for an injunction against proceedings at law.

In Easter Term, 1837, the defendant Smith brought his ejectment in the Queen's Bench, to recover possession of the lands, treating the lease made by Thomas Smith the third, in 1820, (two of the lives in which, were still in being,) as a void lease as against the remainder-man: the said Thomas Smith the third having been only tenant for life with limited leasing powers.

The ejectment was tried at Mullingar Spring Assizes, and a verdict found for the defendant in ejectment. Exceptions were taken on behalf of Smith, to the Judge's charge, and the court of Queen's Bench having heard the case argued, awarded a *venire de novo* (a).

The proceedings in the ejectment were put in issue in the cause by supplemental bill, filed 17th October, 1837, of which the prayer was as follows:—"That the plaintiffs may have the same relief in the premises "as is prayed by their original bill."

On the question of the boundaries the defendants proved that the plaintiff Nangle was now in possession of a much greater number of acres than were specified in the lease of 1672, viz.—"148 acres of profitable land, and 23 acres and 12 perches of unprofitable land, be the "same more or less."—See Mr. Warren's observations, *post* p. 132. On the other hand, the plaintiffs proved, that after the suit of 1774–79, by Thomas Smith the third, for ascertaining the boundaries, an amicable arrangement was come to in 1782, no decree having been pronounced in that cause. On that occasion the boundaries were marked out by a referee in presence of both parties, who then shook hands. Evidence was given which went to shew, that the enjoyment ever since had been according to the boundaries then marked out. But it was admitted that the Nangles were in possession of a considerably greater number of

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28th Nov.  
1836 original  
bill in present  
suit.

Easter, 1837.  
Action of  
ejectment.

17 Oct. 1837.  
supplemental  
bill in present  
suit.

Encroach-  
ments.

(a) See the argument on the bill of exceptions, and Mr Justice Burton's judgment, 6 Law Rec 2d Series, 325, 313.

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acres than were actually specified in the lease of 1672.—See Mr. Pennefather's observations on this part of the case, *post* p. 136.

Sergeant Greene, Mr. Pennefather, Q. C., Mr. Berwick, and Mr. Hardey, for the plaintiffs.

Mr. Warren, Q. C., Mr. J. Martley, Q.C., Mr. T. B. C. Smith, Q.C., Mr. Batty, and Mr. Smyth, for defendant.

*Sergeant  
Greene's  
argument for  
plaintiffs.*

Sergeant Greene, (after stating the facts).—The terms of this agreement are mutual.\* I contend, they operate as a covenant by the landlord to renew, and by the tenant to pay the fine. There are two very distinct classes of cases on this point. *Iggulden v. May*(a) will be relied on, to shew that this is not a covenant for perpetual renewal: that was one of a class of cases where there was a covenant to renew, and that the new lease should contain all former covenants. It undoubtedly is quite settled, that the construction to be put on such a covenant is, that the new lease need not contain a covenant to renew. The same case of *Iggulden v. May* is reported at law(b): and there the court held, that the covenant to renew was to be omitted in the new lease. But, in that class of cases, the covenant was to grant 'a' new lease. The case of *Ball v. Lord Downshire*(c) is also to be relied on: that case is reported in *Mr. Lyne's Work on Leases*.—[The LORD CHANCELLOR observed that *Mr. Lyne's work* was a very accurate and useful publication.]—That covenant was very distinguishable from this, which is the case of a mutual covenant by the landlord to renew, and by the tenant to pay the fine.

The second branch of this case, which I have to submit is this, viz.—that, supposing the court should be of opinion that the words in question do not of themselves amount to a covenant for renewal for ever, yet, from the circumstances of this case, it is to be presumed that there was another independent covenant. This covenant, which has been preserved, was perhaps a memorandum indorsed on the original lease. The original lease is lost; and we account for the loss of it by the burning of the house in the rebellion. The defendant does not say, in his answer, that his part is lost, nor that any search has been made for it. A parol agreement, at the time the lease was granted, would have been binding. The year 1672 was before the statute of frauds.† Therefore, when the contract was entered into, a verbal contract for a lease of lives renewable for ever would have been binding, and carried into effect by a court of Equity. There have been seven succes-

\* See the words, *ante*, p. 120.

† 10 W. 3, c. 12, Ir., corresponding with 2 Car. 2, c. 3, Eng.

(a) 9 Ves. 225.

(b) 7 East, 237.

(c) *Lyne on Leases*, App. 53.

sive renewals, dated respectively 8th April, 1719—5th May, 1752,—2d April, 1768—25th December, 1768—16th February, 1806—12th August, 1820.

The original lease, and the earlier renewals, have been destroyed, in the manner mentioned; but we have the memorials of the renewals which were so destroyed. It is now alleged, that such of the leases and memorials as were the acts of tenants for life are not to bind the remainder-man.—[*Mr. Warren*. We do not say the acts of tenant for life are not evidence against the remainder-man; but we say that his acts cannot construe the covenant as against remainder-man.]

In the case of the *Bishop of Meath v. The Marquis of Winchester* (a), documents found at the family mansion of a former bishop—not signed by him, or in his hand-writing—relating to the patronage of the diocese, were admitted in evidence against his successor in the see. That case was approved by the House of Lords (b). In *Roe v. Rawlings* (c), a rentroll, indorsed by a tenant for life, was held evidence against the lessee of the succeeding tenant for life. The case of the *Attorney-General v. The Bishop of Ely* (d) is a strong case, to shew how far the court will go to support a long possession.

*Mr. Warren*, Q. C., for the defendants.—The case made by Sergeant *Greene*, on behalf of the plaintiffs, may be considered under three heads.

1. He says, the words which we admit were in the lease are in themselves a covenant for perpetual renewal.

2. If they are not, yet, at this distance of time the court will presume that there was a covenant for perpetual renewal in the deed, and that those words refer to that covenant.

3. Supposing that the court will not make that presumption, still these words, with the depositions and proceedings in the causes of 1713, and 1774, give reason to presume, that there was a *parol agreement* independent of the lease of 1672, which would have been valid at that time, being before the statute of frauds.

As to the first point, we have to hand in to the court the adjudication of the Queen's Bench, in the ejectment cause between these parties, expressly deciding, that these words do not amount to a covenant for perpetual renewal (e).

As to the second point made by Sergeant *Greene*, it is not open to them on their pleadings, which treat the words which we admit were in the lease as the covenant which they rely on, and they pray that it may be deemed a covenant for perpetual renewal. But if it were open to them, there is no foundation for such a presumption. All the

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*Mr. Warren's  
argument for  
defendants.*

(a) Alc. & Nap. 508 & 546.

(b) 3 Bing. N. S. 183.

(c) 7 East, 279.

(d) 4 Russ. 102.

(e) 6 Law Rec. 2d Ser. 325, 331.

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evidence produced negatives the supposition, that there was any other covenant for renewal in the deed, save the one which we admit, and which the court of Queen's Bench has decided is not a covenant for perpetual renewal.

As to the third ground on which this case is put by Sergeant *Greene*, viz.—that there was a parol agreement, that the lease should be renewable for ever, I answer, first, that such an allegation has no foundation in fact, being entirely unsupported by the evidence in the cause; and, secondly I answer, that it is shut out from them on these pleadings. It is impossible for them, on a bill for specific performance, to set up now at the bar a contract different from that on which they have relied in their pleadings; they cannot be permitted to file a bill for specific performance of a contract contained in a deed, and then at the bar to say, we admit there was no such contract in the deed, but it was intended by the parties to be in the instrument, and call on the court in fact, to reform that instrument, and make it conformable to what, they allege, was the intention of the parties. That would be a very different sort of relief from that prayed by this bill, which is for specific performance of a contract, actually contained in the instrument on which they rely.

But suppose they had made this case of a parol agreement on their pleadings, is it a case sustainable on the proofs in the cause? [Mr. *Warren*, having commented at length on the bill, and other proceedings in the cause of 1713–16, observed, that the court then had the instrument before it, and expressly refused to decree it a lease of lives renewable for ever. The construction put on it by the court was a covenant to renew for two lives, and Lord Chancellor *Middleton*, decreed accordingly. It was open to Garrett *Nangle*, if he had a case, to file a bill to have the instrument rectified. He brought forward his case as a covenant for lives renewable for ever, and failed. It was a principle, that if a party brings forward his case of an executory contract, and fails, he can never bring it forward again.]

*That all the Smiths who granted renewals were tenants for life: that their acts cannot construe the covenant which is before the court: and that there was no other covenant.*

Then as to the successive renewals which are relied on. All those renewals refer expressly to the words which we admit were in the lease, and to no other covenant whatsoever. That was a covenant to renew for two lives. The two lives were added accordingly, in pursuance of the decree of the court; but, after that, I admit, Thomas *Smith* the second renewed again. He was only tenant for life. At all events, his act cannot construe the covenant. He was jealous of his nephew, who was to succeed him, as next in remainder; and although he had sworn in 1716, that he did not believe there was a covenant for perpetual renewal, yet, he was induced to grant this new lease, in 1754. A memorial was registered, and signed by lessor. His nephew, Thomas *Smith* the third, came to the property in ignorance of

his rights or liabilities. But he was not tenant in fee, as stated by Sergeant *Greene*. By his marriage settlement, dated 10th March, 1764, he had covenanted, that when he got into possession of these lands of Mayne, he would convey them to the same trusts as the other lands, settled by that instrument, that is, to himself for life, with remainder to the issue of the marriage. This settlement was registered, and when he came to the estate of Mayne, on the death of his uncle, he suffered a recovery, and did convey the lands pursuant to that covenant, by deed of the 8th March, 1766. He had, therefore, no power to give a covenant for renewal.—[Mr. *Warren* then commented on the two renewals granted by Thomas Smith the third, on 2d April, 1768, and 25th December, in the same year; and argued, that, as these instruments throughout referred expressly to the very words of the covenant, admitted to have been contained in the original deed, repeating the very words of that covenant, it could not be pretended, that these two renewals were evidence that there was any other covenant.]—As to the partition bill of 1774, amended in 1779, in which it is alleged, that Thomas Smith the second admitted that the Nangles had a perpetual interest in Mayne, we objected to that bill as evidence, there having been no decree in that cause. The words of that bill can only be considered the words of the counsel who drew it. But the court has overruled us on that point.—[LORD CHANCELLOR. I admitted it as evidence, that such a bill was filed in the year 1774.] Taking it as evidence, it is quite untrue to say that Mr. Smith in that suit alleged, *without qualification*, that the Nangles had a perpetual interest in Mayne. The words of that bill are, “that Pakenham demised, *as is alleged*, 148 acres, &c., with a covenant for perpetual renewal, as by “the lease thereof, in the custody of the defendant, would appear.” This cannot be taken as an admission that the Nangles had a covenant for perpetual renewal. He speaks of the contents of a document *as alleged*. He is stating the contents of a document, not in his possession. He, (Thomas Smith the third,) died in 1782; and Thomas Hutchinson Smith became entitled to an estate tail in the property. In Easter, 1786, he suffered a recovery, and in 1786, he settled the property on himself for life, remainder to his issue in tail. After this came the next renewal, that of 16th Februry 1806, and after that, the renewal of 12th August, 1820. What induced him to grant these renewals I cannot say, but I have a right to suggest to the court, that the memorial, put on the registry by old Mr. Nangle, deceived him, as to the right of the Nangle family to renew this lease. The recitals in those renewals have been read, and they clearly shew, perhaps, that he thought the words in question amounted to a covenant for perpetual renewal; but all those recitals expressly refer to the covenant, the words of which are before the court. His mistake as to their legal import cannot alter

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*That the  
Nangles are  
in possession  
of 323 acres  
under a de-  
mise of 171  
acres.*

the construction of those words. After his death, the present defendant came to the estate. He found that under the lease of 1672, which demises "148 acres of profitable land, and 23 acres and 12 perches of unprofitable," making 171 acres and 12 perches, in all, the Nangles had contrived to get into possession of no less than 323 acres of land. Accordingly in September, 1831, he apprised the party of his intention, by serving notice on Mr. Nangle, at the time one of the lives in the lease of 1768 was still living. [Mr. *Warren* then commented on the notices of 1831; 14th July, 1836; 9th August, 1836; and the replies of the plaintiff to those notices.] The plaintiff had stood on his alleged rights. He had set the defendant at defiance, and refused to give up the encroachments. Now, the defendant would stand on *his* rights, and refuse a renewal.—

[LORD CHANCELLOR.—It is a good reason for Mr. Smith refusing to renew, if Mr. Nangle refused to do what, in equity, he ought; but then, the dispute as to the boundary seems to have been settled by arbitration in 1782. Does it appear that there was any more land in the possession of the Nangles than what was then allotted to them?—[Mr. *Berwick* submitted, that there is evidence to shew that no alteration of boundary had taken place since 1782.]—The LORD CHANCELLOR expressed himself not disposed to go into the part and parcel question. He did not see why that question was not tried in the ejectment.]—

—The plaintiff here would find it very difficult to shew, that the party intending to demise 323 acres, only mentioned 171 acres, viz., 148 acres of profitable land, and 23 acres 12 perches of unprofitable. *Perches* are mentioned. This is an important circumstance in considering this part of the case. In *Day v. Fynn (a)*, the words were, "All that house in D., and 10 acres, *sive plus sive minus*." It was there held, on arrest of judgment, that the house and 30 acres could not pass under that demise. In *Portman v. Mill (b)*, the words were, "containing, by estimation, 349 acres or thereabouts, be the same more or less."—[LORD CHANCELLOR. The question in that case was between vendor and purchaser.]—Finally, we submit that the case of *Ball v. Downshire (c)* is a decisive authority against the plaintiffs on the main question in the case. The court, however retained the bill for a year, with liberty to bring an action on the covenant. The plaintiff Ball accordingly brought an action, but framed his declaration so that it was impossible to plead to it. The cause was, in consequence, brought before the court again, on the 9th July, 1823, for further directions; and the court then ordered, that Ball should state what agreement he relied on. Mr. Ball never prosecuted that action, and, in fact, afterwards dismissed

(a) Owen's Rep. 133.

(b) 2 Russ. 570.

(c) Lyne on Leases, App. 53.

his bill, and paid £700 costs to Lord Downshire. We are willing that your Lordship shall decide; but we contend that the court has no jurisdiction to retain the bill directing an issue; for, where all the facts that can be brought forward are before the court, and where the court can as well judge as a jury, the House of Lords has decided, that it is improper to direct an issue. In *Savage v. Carroll* (a), it was held, that where a party has failed to prove the terms of the contract he relies on, this court will not direct an issue to ascertain the terms. In *Nichol v. Vaughan* (b), the observations of Lord Brougham and Lord Lyndhurst are applicable to this case, where there is not any further evidence forthcoming, all the witnesses to the transaction being dead, and the facts as fully before the court as they could be before a jury. In *Buckley v. Wilford* (c), the observations of Lord Eldon are very strong against sending an issue to a jury which ought to be decided by the court. In *Short v. Lee* (d), Sir Thomas Plumer says "The expense and delay of an issue is only to be imposed on the parties in case of absolute necessity." In *Fisher v. Lord Graves* (e), Chief Baron Alexander adopted the same rule. And where there is not sufficient evidence in existence to satisfy the court of the fact, it has been decided, that it is improper to direct an issue, and thereby tempt a jury to find a verdict on insufficient evidence, *Cusack v. Bulkley* (f). As to the supplemental bill which has been put on the file, stating all the proceedings at law which have occurred since the original bill was filed, it was totally unnecessary; it merely prays the same relief as the original bill; and, I submit, it was a most wanton proceeding to put it on the file.

[The LORD CHANCELLOR asked, in the course of the argument, how the question, as to the construction of the covenant, arose in the ejectment suit. If the party was only tenant for life, as it is admitted on all hands he was, how could he make a lease for lives to have any validity at law against the remainder-man, whether there was any subsisting covenant for perpetual renewal or not? His Lordship said he believed Lord Avonmore had expressed an opinion as to such a defence being available at law, but he was not aware that it had ever been acted on.]\*

(a) 2 Ball & B. 451.

(c) 2 Clark & Fin. 171.

(e) 11 Cl. & Y. 379.

(b) 5 Bligh, N.S. 505.

(d) 2 Jac. & W. 497.

(f) 2 Brown's P. C. Tom. ed. 281.

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*That no issue ought to be directed, the facts being as fully before the court as they could be before a jury.*

If tenant for life make a lease for lives in pursuance of a subsisting covenant for perpetual renewal, and dies, has the lessee in such lease a good defence at law to an ejectment by remainder-man?

\* Mr. Justice BURTON, in delivering the decision of the Queen's Bench, observed, in the course of his judgment, that "There was another question as to certain leases made by a tenant for life,

"whether they are subsisting or "not. It was argued, on the one "side, that, independent of the "question, if it were a covenant "for perpetual renewal, they "could not be valid. This was



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Mr. Penne-  
father's argu-  
ment for the  
plaintiffs.

That pos-  
session for  
178 years, and  
renewals at  
inadequate  
rent, sufficient  
to prove title.

That decree  
of 1716 con-  
trary to  
equity, unless  
covenant for  
perpetual re-  
newal in lease.

Mr. Pennefather, Q.C., for the plaintiffs.—The prayer of our bill is, that the covenant contained in the original lease may be declared a covenant for perpetual renewal. I suggest it as a reasonable thing upon the evidence, that there did exist such a covenant in the original lease, though it may have been unskilfully drawn, and difficult of construction. This is quite consistent with the case made by our bill.

Where is the counterpart of our lease? We have proved the loss of our part. The defendants ought to have the counterpart, but have not produced it, or proved the loss of it.

We have been in possession from the date of the lease of 24th May, 1672, to the present time, that is, nearly 180 years. The lease has been renewed seven times. These facts, of themselves, bring us within the authority of *The Attorney-General v. the Bishop of Ely* (a). It was there held, that the bishop's continuing to renew at a very inadequate rent, was evidence of a right of renewal. Sir John Leach said, that continued possession was evidence of rightful title; and he made a presumption of right from 150 years' possession. Here we have had uninterrupted possession for 178 years.

But we have additional evidence of the existence of a covenant for a perpetual renewal. We have, *first*, the stipulation as to the amount of the fine. This stipulation is imperfect in itself. I admit it is not a covenant for perpetual renewal; I think it is not a covenant for any renewal. It is ancillary to something. What could that something have been? The words of it are consistent with the supposition, that it was ancillary to a covenant for perpetual renewal.

Then, the proceedings in the suit of 1713-16;—the court decreed two new lives to be added to the lease. The court could not have made such a decree, unless there was something more in the lease than this stipulation as to the amount of fine. Then, what was that something? Could it have been a covenant to renew for two lives? No; it must have been something more than a covenant to renew for two lives, otherwise Lord Middleton would have violated every principle of equity, in add-

(a) 4 Russ. 102.

"not fully argued on both sides, "so that, even if it were necessary "we cannot express any opinion "on that." In a subsequent passage of his judgment, Mr. Justice Burton again alluded to this question, observing, that the learned Judge, at the trial, "told the jury, that the leases of 1806 and "1820 were valid and subsisting

"leases. This they certainly could "not be, unless there was a cove- "nant for perpetual renewal. A "question might arise, whether "they were so or not, even if "there was a covenant for perpe- "tual renewal; but if there was "not, it is quite decisive."—6 *Law Rec. N. S.* 334.

ing two new lives, at a time when one of the original lives had been 40 years dead, and the other 18 years. The only supposition that is consistent with Lord Middleton's decree is, that the lease did contain a covenant for perpetual renewal.

Then, it is asked why did not Lord Middleton decree it to be a covenant for perpetual renewal? He could not do so, for the inheritor was not before the court.

The defendant in that cause, who must have known what passed in that suit, and the view taken of the lease by the court and by his own counsel, always from that time treated the lease as renewable for ever. He performed the decree of the court, by renewing in 1719. He would have stopped there, and never renewed again, if he had not learned, by the discussion of the lease in the suit of 1713, that its true construction was a lease of lives renewable for ever. Accordingly, in 1752, when the last life in the lease of 1672 dropped, he executed a renewal. Would he have done this, unless he knew that he was compellable to do so? He was under advice, he contested the suit of 1713, he had the original lease or an exact copy before him, and all the lights which the discussion of it in the suit must have given him. In 1754, another life dropped, and he renewed a third time. These two acts of his are unaccountable on any other supposition, than that there were words in the lease which rendered it renewable for ever. His acts are evidence against the remainder-man. *Bishop of Meath v. Lord Winchester* (a); *Madison v. Nuttall* (b); *Doe v. Pettett* (c); *Roe v. Rawlings* (d); *Gleadow v. Atkin* (e); *Thort v. Lee* (f); *Saunders v. Annesley*, (g).

The counsel for the defendants lay great stress on the circumstance, that these renewals recite the stipulation as to the amount of the fine, and do not recite any covenant for perpetual renewal. This is explained by the circumstance, that when the fine was apportioned between Mayne and Fiermore, under the decree of 1716, it became necessary to recite that stipulation as to the fine, and the change in its amount by the decree; but as there was no contest as to the right of renewal, it was unnecessary to recite the words of the original lease, on which the right to renew was founded.

Then, Thomas Smith the third comes to the property, and, with full knowledge of the circumstances, considers himself under the obligation to renew, and does renew twice accordingly. All the circumstances of the suit in 1713-16, and the lease of 1719, are fully recited in his marriage settlement of 1766. And it is admitted that the counterparts of

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*That Thos. Smith 2nd, after lease fully discussed in suit of 1713-16, always treated it as renewable for ever.*

*And all his successors.*

(a) Alc. & Nap. 508.

(c) 5 B. & A. 223.

(e) 1 Cr. & M. 423.

(b) 6 Bing. 226.

(d) 7 East. 279.

(f) 2 Jac. & W. 491, 464.

(g) 2 Sch. & Lef. 101.

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v.  
SMITH

*That the  
Nangles have  
not en-  
croached.*

the two renewals of 1752 and 1754 were in his possession. How is his conduct to be accounted for, unless there was a clause of perpetual renewal in the original lease? In 1774, he files a bill for ascertaining boundaries, and alleges that his tenant has a perpetual interest in Mayne. The whole equity of the bill of 1774 depended on that fact. The boundaries are settled amicably in 1782; maps made; the parties shake hands, and, from that time, till the present defendant set up a charge of encroachment, there has been no change whatsoever in the boundaries. The piece of bog that is now disputed, containing 126 acres, was allotted to Mr. Nangle by that arrangement; he has had it ever since, and nothing more. It is said, that the piece of bog in question was not included in the original lease. We say, it passed under the words, "the lands of Mayne, containing 148 acres of profitable land, and 23 acres and 12 perches of unprofitable land, be the same more or less, with the rights and appurtenances." The Packenham got the property under the proclamation, confirmed by act of parliament (a), inviting adventurers and soldiers to go over to Ireland to put down the rebellion. They were to be rewarded by so many acres of profitable land, "bogs, rocks, and mountains to be thrown in." These are the words of the proclamation, and the act confirming it. Packenham demised Mayne to Cooper according to the same principle as he received it, and which must be looked on as the law of the country at the time. The bog was looked on as appurtenant to the profitable land.—[The LORD CHANCELLOR intimated that he was not disposed to go into the boundary question.]—That was all settled in 1782. Thomas Smith the third died in 1784, and was succeeded by Thomas Smith the fourth, as tenant in tail. He suffered a recovery, and made himself tenant for life in 1796; and, on 16th January, 1806, he also recognises our right, and grants a renewal. In 1820, he renewed again, and the latter instrument is witnessed by the present defendant, who is also proved to have been agent to his father, the lessor in that deed. Finally, we rely on *Ball v. Lord Downshire* (b), as an authority which sustains our case in all its parts.

*Mr. Martley's  
argument for  
defendants.*

Mr. J. Martley, Q. C., for the defendants.—The supposition of the lease being unskilfully drawn is met by the fact, that there was an interlineation in the hand-writing of Sir Thomas Packenham, who was *Prime Sergeant*. It is therefore to be presumed, that it expressed in proper language the intentions of the parties. Then a covenant which the court will construe as a covenant for perpetual renewal must be a clear covenant. *Kenny v. Ford* (c); *Browne v. Tighe* (d); *Platt on*

(a) 17 Car. 1. Eng. Scobell, 45.

(c) Batty 531.

(b) Lyne on Leases, App. 58.

(d) Hayes, 158; S. C. 8 Bligh 272.

*Covenant (a).* It must be so clear, that it will bear no other construction, without force and violence done to the words and the context (*b*). And nothing is to be supplied by intendment (*c*). To say that the acts of the Smiths are evidence of *something more than a limited covenant*, is attempting to give a construction to the covenant by the acts of tenants for life, contrary to *Iggulden v. May*. The proceedings in the cause of 1713,–16, and the recitals of all the renewals exclude the supposition of the existence of any other covenant than the one which we admit, and in fact, the only question before the court, on these pleadings, is to construe the words of that covenant. In *Bull v. Lord Downshire* the parties whose acts were relied on, were seized in fee—

[LORD CHANCELLOR.—That was not the ground on which Lord Mannors went. Whether seized in fee or not, their acts could not *construe* the covenant, but whether tenants for life or seized in fee their acts may be evidence of the *existence* of a covenant.]

—The acts of the tenants for life here negative the existence of any covenant in the deed but the one which we admit. As to the existence of a parol agreement, that case was attempted to be made in 1713, and could not be made out. If the evidence was insufficient then, it must be doubly so now.

Mr. T. B. C. Smith, Q. C., for the defendant, Thomas Payne Smith, a minor.—The court will see its way clearly, before it makes a decree which will bind the inheritance of a minor.—

[LORD CHANCELLOR.—I feel the case to be one of extreme difficulty, but I am bound to apprise you, that I am anxious to lay hold of every circumstance that appears in the case, so far as I can judicially lay hold of it, in order to sustain this very long possession.]

—It is insinuated that we may have the counterpart of the lease of 1672, and might produce it. This allegation is now made at the bar for the first time. The instrument related to Fiermore as well as Mayne, and the presumption is, that it remained with the Pakenhams. We are entitled to retort, by saying that they ought to have proved a search for the counterpart among the Pakenhams' papers. The *King v. Castleton (d)*. The *onus* is on the plaintiffs to make out their case.

It was argued by Sergeant *Greene*, that this covenant which we admit the deed to have contained, does, in point of law, amount to a covenant for perpetual renewal. Mr. *Pennefather*, however, abandoned that proposition as untenable.—

[LORD CHANCELLOR.—Yes: I take it that point has been given up by the plaintiffs?—Mr. *W. Berwick*—We shall not insist that these

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Acts of tenants for life are evidence against remainderman.

Mr. Smith's argument for infant defendants.

(a) p. 243.

(c) Ibid.

(b) Per Lord Brougham, 8 Bligh 239.

(d) 6 T. Rep. 236.

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words taken by themselves entitle us to the relief we pray by our bill.]

—Then two points remain to be considered. First, the supposition of another covenant in the instrument. Secondly, the suggestion of a parol agreement. The evidence in the cause may be classified thus.

1. The proceedings in the cause of 1713,—16.

2. The memorials of renewals, and the renewals from 1716 to the present time.

3. The bill of 1774—79.

4. The acts of the parties.

*That the object of the bill of 1713 was to obtain the insertion of a covenant for perpetual renewal.*

The bill of 1713, strictly speaking, was a bill to reform the instrument. It sets out the words of the covenant which we admit it contained. If it contained any other covenant, is it not unaccountable that the bill should not have stated it such as it was? The depositions in that cause consist of parol evidence as to the intentions of the parties, and Mr. *Malone* for the plaintiff, at the hearing offered terms, if the defendant would consent to insert a covenant for perpetual renewal, shewing that the object of that suit was, to reform the instrument. From all that passed in that cause, and when we consider that the deed was then actually before the court, the inference is irresistible, that the words which are before the court were the only covenant relating to renewal in the deed. The court did not reform the instrument, and could not: for there was only the oath of one witness which went to the point, contradicted by the defendant's answer. It was oath against oath.

*That presumption from renewals is rebutted by their contents.*

The second class of proofs relied on are the renewals and memorials of renewals from 1716 to the present time. The difference in the mode of reciting the lease of 1762, observable between the memorial which was executed by the lessee only, and those which are executed by both lessor and lessee, raises the strongest presumption that the memorial of 1719 was inaccurate. The memorials executed by lessors set out the words of the admitted covenant, and purport to add a life in pursuance of the *said* covenant. The present bill says, that we are estopped by the recitals in the renewal of 25th December, 1768. We are willing to be bound by every word of that renewal. When these renewals are examined, they are conclusive that there was no other covenant.

*That statement in bill of 1774-79 was immaterial to relief thereby sought.*

The third class of evidence is the bill of 1774—79. We objected to that bill, as evidence, on the authority of the *Banbury Peerage Case*, (a) and the case of *Doe* on the demise *Bowerman v. Lyburn* (b). It is now before the court for so much as it is worth. But it is worth nothing; because the statement in that bill, which is relied on by the other side, formed no part of the grounds of the relief sought. The lease of Coole had expired, the lease of Mayne had not. Smith had a right to

(a) 2 Selw. N. P. 712.

(b) 1 T. R. 2.

complain of encroachments on Coole, under color of the lease of Mayne, whether Nangle's interest in Mayne was perpetual or not. The statement therefore was unimportant, and the mere words of the counsel.

The last class of evidence are the acts of the parties. If we shew, that the acts of the parties are traceable to other causes than the existence of a covenant for perpetual renewal, we get rid of the inference that is attempted to be drawn. *The Attorney-General v. The Bishop of Ely* is distinguishable, on that ground, from the present case. All the acts of the parties here are quite explicable and reasonable, on the hypothesis we make, that the covenant, the words of which are before the court, was the *only* covenant; but the occurrences which have taken place are inexplicable, on the hypothesis of the plaintiff, that there was another and an independent one. And, if the nature of a covenant be even doubtful, the court will not enforce specific performance. *Harnett v. Yielding (a)*; *Price v. Assheton (b)*.

Finally—as to the parol agreement: although the lease was before the statute of frauds, yet, it is a rule of the common law, that if a parol contract be afterwards reduced to writing, the written instrument concludes the parties. True, if a mistake be made in reducing it to writing, equity will relieve, on a bill to reform the instrument. That is the only mode in which they could take advantage of a parol agreement—if any such there were. But a bill of that nature must be filed as soon as the mistake is discovered. *Blennerhasset v. Day, (c)*. On such a bill, what could excuse delay for 150 years?

Mr. *Walter Berwick*, for the plaintiffs, in reply.—We do not say that these words, supposed to have been indorsed on the lease, of themselves constitute a covenant for perpetual renewal. But we say that the lease did contain a covenant for perpetual renewal. No particular form of words is necessary to such a covenant. *Browne v. Tighe (d)*; *Curry v. Stanley (e)*; *Easterby v. Sampson (f)*; *Saltoun v. Houston (g)*; *Lyne on Leases*, 93. It is established, by the evidence, that the person who made that lease intended it to be a lease renewable for ever. The intention of the parties is strong evidence to shew the contents of a lost instrument. *Bateman v. Murray (h)*

[The LORD CHANCELLOR having intimated, that it would be impossible for him, from the evidence before him, without further inquiry, to adopt the conclusion that the lease contained a covenant for perpetual renewal, Mr. *Berwick* abruptly terminated his argument, and acquiesced in the expediency of directing an issue.]

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That the  
acts of the  
parties are  
traceable to  
other causes.

That parol  
contract cannot  
be resorted  
to where there  
was a written  
instrument.

(a) 2 Sch. & Lef. 549.

(c) 2 Ball & Beat. 118.

(e) *Lyne on Leases*, app 121.

(g) 1 Bing. 433.

(b) 1 Young & Col. 442.

(d) *Hayes*, 158; S. C. 8 Bligh, 293.

(f) 6 Bing. 650.

(h) 1 Ridg. P. C. 187.

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LORD CHANCELLOR.—There may have been something in this lease besides this memorandum, but I would not act on it, without directing an inquiry. The existence of a previous agreement would be an important circumstance in presuming the contents of the lease. Mr. Smith argued, that the fact of perpetual renewal being only asserted by one witness, and denied by the defendant in his answer, there was oath against oath. That only applies to a case where the defendant swears as to a matter within his own knowledge. If there had been a recital in the deed, that there was an agreement for perpetual renewal, that would have been a binding covenant. Here the Smiths have renewed from time to time, and the party may thus have been prevented from giving evidence while it was accessible. As to a verbal agreement, the plaintiff's counsel do not lay much stress on it. I do. If an authority were wanting, there is a case before Lord Manners. Here there are great difficulties in granting a renewal, but there are greater difficulties in refusing it.

*Reg. Lib. Fol. 28.—22d Dec. 1838.*

Let the bill be retained for six months, with liberty for the plaintiff, John H. Nangle, to commence a feigned action at law, against the defendants, to which the said defendants shall appear *gratis*, and plead the general issue, and admit all matter of form, so that a trial may be had between the parties, to try the following issues :—

1st.—Whether, at or before the time of the execution of the lease, dated the 24th day of May, 1672, in the pleadings mentioned, it was agreed between Henry Packenham, (the lessor in that lease), and Bartholemew Cooper, (the lessee therein), that the said Henry Packenham should grant to the said Bartholemew Cooper, his heirs and assigns, a lease for lives, renewable for ever, of the lands and premises in the said lease mentioned.

And, 2dly.—Whether, independent of the memorandum or indorsement, made upon the said lease, whereby it was agreed, by and between the parties thereto, “that on the renewing or “inserting of any life or lives, there should be paid by the “lessee, his heirs or assigns, the sum of £16. 16s. 4d,” there was contained in the said lease of the 24th day of May, 1672, any clause, covenant, or agreement, relating to the renewal of the said lease to the said lessee, his heirs and assigns.

The parties to the said action to be respectively at liberty to give in evidence, on the trial of such issues, all the evidence used by the said parties on the hearing of this cause.

The said issue to be tried by a special jury of the county West-

meath, and that the Judge before whom such trial shall be had shall certify to this court the verdicts to be had on said issues respectively.

And reserve further directions 'until the return of the Judge's certificate.

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*Saturday, 19th January 1839.*

The defendants having appealed from the above decree, Mr. *Warren*, on their behalf, this day moved the LORD CHANCELLOR to stay the trial of the issues pending the appeal to the House of Lords. The application was granted.



## ROLLS.

*Monday, January 14th, 1839.*PRACTICE—FULL ANSWER AMOUNTING TO A  
DISCLAIMER—COSTS OF.

PLUMTRE v. WALSH and others.

Where J. W. was made a defendant solely in relation to certain deeds, which the bill stated he had in his possession and claimed a lien on; and J. W. put in a full answer, going through all the statements of the bill, relating to the several other defendants, and concluded by denying that he had the deeds in his possession, &c. or that he claimed any lien thereon—*Held*; that plaintiff might dismiss the bill as against J. W., upon the terms of paying him the costs properly incurred, regard being had to the right in which he was made a defendant; and it was referred to the Master to tax said costs.

Mr. EDWARD H. BURROUGHS moved that the plaintiff might be at liberty to dismiss the bill, as against the defendant J. Walsh, upon the terms of paying him the costs of a disclaimer; and that it might be referred to the Master to tax said costs.

In this cause, the plaintiff, having obtained a decree for a sale, filed a supplemental bill to get in certain deeds necessary to make out title under the decree, and making the several solicitors, in whose possession the deeds were, parties. The bill required the several parties to answer, respectively, whether they had any, and which, of said deeds in their possession, &c.; and whether or not they claimed, respectively, any, and what amount of lien thereon? After the other defendants had answered, admitting that they had the required deeds in their possession, and stating the amount of the liens which they claimed thereon,\* the defendant J. Walsh, who had been made a party, in consequence of his answer to a private communication from the plaintiff respecting the deeds being deemed unsatisfactory, answered the bill at length, going through the various statements relating to the several deeds and to the several other defendants; and concluded by denying that he had any of the said deeds in his possession, custody, or power, or that he claimed any lien thereon.—Counsel contended, that this long answer amounted to no more than a disclaimer, and was obviously put in for the purpose of multiplying costs; that the court ought to discountenance such a practice; and that Walsh ought not to have the costs of more than a disclaimer.

Mr. W. Bourke, *contra*, insisted that the defendant Walsh was entitled to the full costs of his answer. He was bound to answer; a mere disclaimer would have been altogether insufficient: because, the bill required him to make a search for the deeds, and to answer whether or not he had any, and which, of them. If the plaintiff had desired Walsh's answer, only to a particular part of the bill, he should have given notice

\* See one of the several applications that were made in this cause last term, *Plumtre v. O'Dell*, *ante*, p. 113.

to that effect; but, as he did not, he should not complain that a full answer has been put in. *Parsons v. Potter*(a) is a direct authority against the present application.

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MASTER OF THE ROLLS.—I admit that *Parsons v. Potter* (a) is a strong case for the defendant; but I remember the case of *Quinlan v. Quinlan*(b), in the Exchequer, in which the decision was quite as strong the other way. After decree in that case, there was a supplemental bill to bring certain annuitants before the court; and one of the defendants, having in his answer gone through all the statements in the bill, relating to the several other defendants as well as to himself, concluded by stating, that he had assigned his annuity for full and valuable consideration; and that he did not claim any interest whatever in the premises. There an application, similar to the present, was made and granted after much discussion. In principle, that case cannot be distinguished from the present, and fully maintains the plaintiff's application.—Here is a supplemental bill filed for the purpose of getting in title deeds, and making Walsh, Vincent,\* Hewson, and others, parties; requiring them respectively to set forth, whether they had the deeds, or any of them, and the amount of lien they claimed thereon. Any of the parties, having the deeds in his possession and a claim of lien, had a right to answer the several statements of the bill, as he might be advised. But a party, not having either the deeds or any claim of lien, had no right to recapitulate the bill, as is here done. In the case, which I fear will occur, where it may be necessary to bring a number of judgment creditors before the court, the consequence of allowing answers of this kind would be mischievous in the extreme. I shall, therefore, follow the principle of *Quinlan v. Quinlan*.

Let the plaintiff be at liberty to strike the defendant John Walsh out of the bill, on payment of costs; and, on the taxation of said costs, let the Master have regard to the right in which the

(a) 2 Hog 281.

(b) Not reported.

\* Besides the application against the defendant Geo. Hewson, last Term, (see *ante*, p. 13,) there was also an application, precisely similar, against the defendant Nicholas Vincent, who by his answer admitted that he had the principal title deeds in his possession, and that he claimed a lien on them, on account of business done for the inheritor, Geo. O'Dell. It appeared, howe-

ver, by the answer, which stated the time when the business was done, and also the time when the deeds came into the hands of the defendant, that the plaintiff's rights were prior. The Master of the Rolls ordered, that Vincent should bring in the deeds, without prejudice to his lien; and referred it to the Master, to inquire and certify the nature and amount of such lien.

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said defendant J. Walsh was made a party defendant, and tax only such costs as were properly and necessarily incurred by the said defendant in answering the said bill.

*Tuesday, January 15th.*

PRACTICE—MISTAKE IN TITLE OF INTERROGATORIES  
AND DEPOSITIONS—AMENDMENT OF, AFTER  
PUBLICATION.

MITCHELL and others, v. ROE, MEEHAN and others.

Where after publication had passed, it was discovered that in the title of the interrogatories and depositions filed on behalf of the plaintiff, the names of two of the defendants in the cause had been omitted by mistake—This court ordered that the plaintiff should be at liberty to amend the title of the interrogatories and depositions, and after the amendment, that the several witnesses should be re-sworn to the truth of the depositions so altered.

Mr. LOFTUS BLAND, on behalf of the plaintiffs, moved that the consent entered into before Wm. Henn, Esq., the Master in this cause, on the 23d of November last, might be withdrawn; and that said Master might be directed to settle his draft report, pursuant to the summons which issued for that day; and that the proceedings taken before the said Master might stand in the same plight and condition as they then were. Or, that the defendant Meehan might be directed to proceed forthwith, effectually on his discharge, pursuant to his undertaking for that purpose.—And that the plaintiffs might be at liberty to add the names of Henry Drought, and Sarah his wife, as defendants, in the title to the interrogatories exhibited for the examination of witnesses, and of the depositions of the witnesses thereto, on behalf of the plaintiffs, in support of the charge of the said plaintiffs filed under the decree to account in this cause; and that such depositions, when so altered, might be re-sworn by the witnesses respectively. Or, that the plaintiffs might be at liberty to read the said depositions, without amendment in support of their charge; and that the defendant Meehan, might be deemed, by his several proceedings on foot of the plaintiffs' said charge and his own discharge thereto, to have waived all objection to the title of the said interrogatories and depositions. Or, for such other order, &c.

To ground the present application, the solicitor for the plaintiffs made an affidavit, stating, that in the year 1831, the plaintiffs filed the bill in this cause, against the defendant Thomas Mitchell, and several others, to raise the amount of three judgments for the aggregate sum of £3426. 10s. and costs, obtained by the plaintiff Sarah Mitchell, in trust for her children, against the said Thomas Mitchell, in the court of Common Pleas, in Trinity Term, 1815. That by marriage settlement made in 1816, upon the marriage of the said defendant, Thomas Mitchell, all his estates were conveyed to the trustees of the said settlement,

whereby he became strict tenant for life of the lands therein, and in the pleadings mentioned; and that the said settlement had been read and admitted before the Master in this cause. That it appeared, the plaintiffs' three judgments were the only charges affecting the inheritance.

That, in the year 1824, the defendant Thomas Mitchell took the benefit of the insolvent act; and that the defendant Meehan, was appointed his assignee, and thereupon was made a defendant, in such right, in this cause.

That in April, 1837, the plaintiffs obtained a decree to account; and that the plaintiffs and the defendant Meehan, went before the Master for his directions on the 15th of May following, when the plaintiffs were directed to file a charge on or before the 27th of the said month, and the defendant Meehan, to file a discharge thereto, on or before the 1st of July following. That the plaintiffs' charge was filed accordingly; but that the said Meehan, having by various pretences obtained further time, did not file his discharge until the 31st of October.

That on the 10th of January, 1838, the Master certified for a commission to examine witnesses, and fixed the 16th of April, 1838, as the day when the examination should close. That the plaintiffs, accordingly, caused interrogatories to be exhibited to several witnesses who were cross-examined on behalf Meehan; and that on the 20th of June, the depositions were used for the plaintiffs, and commented on by counsel, for Meehan, and the plaintiffs' charge was partially proved. That on the said 20th June, Thomas Mitchell, the insolvent tenant for life, died; and, as the proceeds of his estate would be insufficient to satisfy the demands of the plaintiffs, the interest of Meehan in this cause was at an end. That the defendants, Roe and wife, having become entitled to the inheritance upon the death of Thomas Mitchell, without issue of his marriage, the Master gave Roe and wife leave to file a discharge to plaintiffs' charge, but that they had declined doing so. That on the 12th of November, 1838, the plaintiffs having proved their charge, the solicitors of the plaintiffs, and of Roe and wife, attended before the Master on an adjourned summons to settle his draft report; when Meehan alleged he had no notice of the previous meeting, and required further time to go into his case. Whereupon, at the suggestion of the Master, the plaintiffs' solicitor consented that the said Meehan should have some further time, upon his undertaking to proceed forthwith effectually on his discharge. That, Meehan having totally disregarded his undertaking, the plaintiff issued a summons for the 15th of December, for the Master to settle his draft report; and all parties being in attendance, Meehan's counsel objected, that the interrogatories and depositions filed on behalf of the plaintiffs could not be used; as the

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names of two formal defendants in the cause, viz., Henry Drought, and Sarah, his wife, had by mistake been omitted in the title of the cause, in which said interrogatories and depositions are entitled. That the Master, having allowed the objection, would not proceed further; but directed plaintiffs to make such application to the court as they might be advised.

For the present application, counsel cited *Malone v. Morris* (a); *Bland v. Archbishop of Armagh* (b); *Sinclair v. James* (c); *Austin v. Hinton* (d).

Mr. James Plunkett, for the defendant Meehan, said that the plaintiff had by his notice asked too much; that if he had confined his application simply for leave to amend, no opposition whatever would have been given to it by Meehan. But that as the notice seeks liberty to amend, and also to tie up the defendant Meehan, so that he could not proceed upon his discharge, it became necessary for him to appear upon this motion. The plaintiffs' application has exceeded its proper bounds; and Meehan must therefore have the costs of appearing in this motion, *Curre v. Bowyer* (e).

The MASTER OF THE ROLLS then made the following order :—

Let the Master in this cause, be at liberty to amend the title of the interrogatories for the examination of witnesses, in aid of the account in this cause filed on behalf of the plaintiffs, and of the depositions taken upon such interrogatories, by inserting the names of the defendants, Henry Drought and Sarah his wife, which have been omitted by mistake; and by striking out the name of Thomas Mitchell, who has lately died; and let the plaintiffs be at liberty, thereupon, to produce and re-swear such of the witnesses, examined on the said interrogatories, as may be willing to be re-sworn to the truth of the depositions so altered; and let the examiner certify which of said witnesses have been so re-sworn, and let the plaintiffs pay to the defendant Meehan, the sum of £4,\* as his costs of appearing on this motion,

(a) 2 Mol. 324.

(b) 5 Bro. P. C. 62; Dick 50.

(c) Dick. 277.

(d) Dick. 280.

(e) 3 Swanst. 357.

\* As to this sum, see *Walker v. Walker*, and others, *post* p. 147.

*Wednesday, January 16th.*

**PRACTICE—PROCEEDING AGAINST SURETIES OF  
DEFAULTING TENANT.**

**RICHARDSON v. WALSH and others.**

Mr. WM. BROOKE, Q.C., with whom was Mr. *Hogan*, came in to shew cause against a conditional order, that the receiver should be at liberty to proceed against the sureties of a defaulting tenant, who had been attached, for non-payment of £90, being the amount of his half-year's rent, due on the 1st of November, 1836, the tenant having since taken the benefit of the insolvent act.

The seven years' lease under the court had expired on the 1st of November, 1836, when the last half-year's rent was due; and the tenant had been turned out of possession, by injunction, on the 23d of December following, the cause having been wound up by the consent of all the parties. It appeared, by several affidavits, that from the 1st of November, 1836, until the injunction was executed, being a period of nearly two months, there was stock upon the premises to the value of £250; and that the receiver was present when the injunction was executed, and must have been aware that there was a sufficient distress. It further appeared, that from the time when the injunction was executed, until the month of May, 1838, when the attachment issued for non-payment of the rent, the tenant appeared to have been in solvent circumstances, and had more than sufficient property to have discharged the arrear of rent. Shortly afterwards he was arrested, and took the benefit of the insolvent act.

Counsel contended, that a receiver is bound to enforce the rent from half year to half year; and that the loss of rent, in this case, was clearly owing to the negligence of the receiver, who might easily have enforced it, and who had been continued, since the winding up of the cause, for the sole purpose of getting in the rents due up to and for the 1st of November, 1836. It was submitted that the circumstances of this case brought it exactly within the authority of *Sherrells, Minors* (a), in which the late Master of the Rolls held, that where the receiver had been guilty of negligence, the sureties of the defaulting tenant should be discharged. If it should be established, that the surety is liable for rent lost by the want of due diligence on the part of the receiver, and that there is no limit to the liability of sureties for tenants under this court; either, the court will have to dispense with sureties altogether, or it will be so difficult to procure them, as seriously to prejudice the value of land let under the court.

Where a tenant under the court was in default, and had taken the benefit of the insolvent act—*Held*, that the recognizances of the sureties should be put in suit, though it appeared that the arrears due might have been recovered from the tenant, if the receiver had used due diligence.

(a) 2 Hog. 192,

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Mr. *Miller*, Q. C., on the other side, was not called on.

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MASTER OF THE ROLLS.—I do not mean to quarrel with the order made by the late Master of the Rolls, in *Skerretts*, Minors, as the circumstances of that case, which, I remember very well, were peculiar. There, the receiver and the defaulting tenant were either brothers or brothers-in-law, and appeared to have been in collusion; but here, nothing of that kind is imputed to the receiver. Indeed, the facts, appearing upon the affidavits just read, negative any thing like collusion between the receiver and the tenant. The only defence, suggested for the sureties, is grounded upon the alleged negligence of the receiver; and it is said, I should make an order of reference to the Master, to inquire whether or not the receiver proceeded with due diligence; and that, if the receiver was negligent, the sureties should be discharged. I cannot assent to that proposition; on the contrary, I would hold the surety liable, even though the Master had reported that the receiver had been negligent. I will not expose the estate to the risk, nor involve the court in the difficulty, of questions as to the due diligence of the receiver, whether or not, at this or that time, there was a sufficient distress and the rent might have been recovered? When the tenant is in default, and the rent cannot be recovered from him, I think the safer course is, to look at the case as the simple one of principal and surety at law; in which it is perfectly settled, by *The Bank of Ireland v. Beresford* (a), and that class of cases, that the mere lying by, or delay in calling on the principal, does not discharge the surety. In truth, the surety of a tenant under the court should be regarded rather as a principal; for, it is to his solvency the court looks: and by his credit the lease is obtained; and it is his concern to see that the tenant pay regularly. Therefore, in cases of this kind, I am not disposed to carry the decisions, limiting the liability of sureties, any farther than they have already gone; nor have I any fear, upon this account, that the value of the lands to be let under the court will be diminished. I must say,

Disallow the cause shewn, with costs.

(a) 6 Dow. 233.

*Wednesday, January 16th.*

PRACTICE—COSTS OF MOTION.

*WALKER v. WALKER and others.*

There had been an application, on behalf of the defendant, that the receiver in this cause might be removed, and that he should pass his account. That motion was refused, and his Honor ordered that the receiver should have £8 for his costs of appearing on the motion. Afterwards, the receiver furnished to the defendant his bill of costs of appearing on the motion, amounting to about £25. It was then discovered, that the Master of the Rolls had, in Chamber, varied the order, by expunging '£3 for'—thereby leaving it generally, that the receiver should have his costs of appearing on the motion.

Mr. *D'Arey*, for the defendant, now moved, that the original order might be restored. He stated the order as originally made, and its subsequent alteration behind the back of his client, who desired that a sum should be specified in the order, to avoid the expense of taxation, which would be unavoidable, if the costs should be given generally.

MASTER OF THE ROLLS.—I remember this case. I did, in the original order, mention £8, as the measure of the costs; but, afterwards, the receiver's solicitor being dissatisfied with that sum, produced to the register his bill of costs, which was afterwards produced before me in Chamber. Upon looking over it, I was of opinion that £8 was not enough to allow the receiver for his costs on the motion. I therefore amended the order, by making it for the costs generally of appearing on the motion, subject to taxation. The practice of inserting, in the order, a particular sum, is for the purpose of doing justice, without the necessity of additional and unnecessary costs; but whenever the solicitor of the party entitled to the costs produces his bill to the register, and objects, that the sum mentioned in the order is inadequate, the bill of costs is then laid before me; and if, upon looking over it, the sum appears to me to be inadequate, I amend the order, by expunging the sum, and leaving the order for costs generally; or, perhaps, in a clear case, by increasing the sum originally mentioned.

When, in this court, the costs of making or appearing on a motion, are ordered to either party, and a sum is mentioned in the order for the costs; if the party getting his costs thinks the sum insufficient, he may furnish his bill to the register, who will lay it before his Honor in Chamber. If upon consideration of the bill, the sum appears insufficient, his Honor will amend the order, and either give the party his costs generally, subject to taxation, or, in a clear case, at once increase the sum originally mentioned.

No rule.



*Thursday, January 14th., 1839.*

SALE IN LOTS, UNDER DECREE—COMMON TITLE DEEDS  
OF THE SEVERAL LOTS—CUSTODY OF.

CUNNINGHAM *v.* HUME and others.

When an estate is sold under a decree in several lots, the purchaser of the largest lot is to have the custody of the title deeds common to all the lots, on the terms of giving to the purchasers of the smaller lots, attested and compared copies, and a covenant for their safe custody, and the production of them, when necessary.

Mr. LITTON, Q. C., Mr. *Hickson*, Q. C., and Mr. *Mullins*, on behalf of Edward Day Stokes, Stephen Edward Collis, Thomas Mullins, John J. Hickson, and Peter Thompson, purchasers under the decree in this cause, moved that the report of the Master in this cause, bearing date the 30th of November, 1838, under the order of reference of the 4th of May, 1838, might be varied, in the manner specified in the objections filed, &c.

The several lots have common title and common title deeds. There was not any condition of sale as to the deeds. The sale of the first lot was on the 4th of December, 1832, and of the last on the 4th of February, 1833; the purchasers were in the following order:—

Edward Day Stokes, £12,250—Thomas Mullins, £4,400—John J. Hickson, £900—Stephen Edward Collis, £2,800—Peter Thompson, £3,550—Pierce Mahony, £6,850.

The last lot is largest and most valuable, and was purchased subject to the sum of £20,000, charged upon it, and to be payable on the death of the plaintiff in this cause to his children; so that the purchase money of this lot *will* be £26,850.

By the order of the 4th of May, 1838, it was referred to the Master to inquire and certify, whether any, and which of the title deeds, &c. in his office, to the credit of this cause, relate exclusively to each or any of the several lots; and it was ordered that the Master should hand over to the purchasers, or their attornies lawfully authorised, such of the said title deeds, &c. as relate exclusively to the lands purchased by them respectively.—It was further ordered, that the Master should inquire and certify whether any, and which of the said deeds, &c. form part of the common title to all or any of the lands and premises sold under the decree; and if so, whether they or any of them should be retained in court for the benefit of all the purchasers, or be handed over to any and which of them, on the terms of giving attested and compared copies thereof to the other purchasers, and executing a proper deed or deeds of covenant for the production of them on all proper and necessary occasions.—It was further ordered, that in proceeding under this order, the Master should have regard to the rights of the children of the plaintiff, R. G. Cunningham, to the sum of 20,000, charged for their benefit upon the lands; and if he should be of opinion that it would be necessary for their security, that any of the said deeds should be re-

tained in court, until the said £20,000 shall have been paid, he should certify as to the particular deeds to be retained; and it was ordered that they be retained accordingly. It was further ordered, that the Master should certify whether the deeds, &c. so to be retained, should be delivered to any, and which of the said purchasers, after the said charge of £20,000 shall have been satisfied, and upon what terms.

Under the foregoing order, the Master's report had two schedules; one, shewing the several deeds, &c. exclusively belonging to each of the several lots; and the other, shewing the common title deeds of all. As to the latter deeds, &c., he found that it would be for the benefit of the several purchasers, and also for the security of the minor children of the plaintiff, in regard to their rights to the sum of £20,000, charged on said lands, that all the said common title deeds should be lodged in the Bank of Ireland to the credit of this cause, with liberty for all the said purchasers, and their respective solicitors, thereto lawfully authorised, to inspect the same, and take copies thereof, on all proper occasions, at proper and reasonable times; and that when the said charge of £20,000 shall have been satisfied, the said common title deeds, &c. should be delivered to Pierce Mahony, who, in the event of paying off the said charge of £20,000, *will be* the purchaser of the largest lot,—he covenanting for the safe keeping and production of same, &c. and giving attested and compared copies thereof to the several purchasers of the lots of inferior value.

To this report, the purchasers of the smaller lots took the following exceptions:—

1st. That the Master should have certified who was the *present* purchaser of the largest lot, having regard to the actual amount of the purchase money for which the said several lots were respectively sold; and accordingly should have certified that Edward D. Stokes was the purchaser of the largest lot.

2. That the Master should have certified that the common title deeds, &c. should be lodged in the Bank of Ireland to the credit of this cause, with the privity of the Accountant-General, and should still be retained there, after payment of the said sum of £20,000, in order that the said common title deeds might be preserved there, for the use and benefit of all the purchasers under the decree in this cause.

The Counsel now insisted on the latter exception only; and relied upon the absence of any condition of sale as to the deeds. They also produced an order, made in June, 1835, by the late Master of the Rolls, in *Sanders v. Sanders* (a), to shew that the settled practice of the court, in cases of this kind, was to order that the common title deeds should be lodged in the Bank of Ireland, with the privity of the Ac-

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countant-General, for the benefit of all the purchasers. Upon the understanding that this was the settled practice, the purchases have been made under this decree; and though the court should now be disposed to change the old practice, it would not affect the present purchasers, by an *ex-post facto* rule. In England, a different practice appears to have prevailed; but there, it is under a condition of sale, and the purchasers buy with notice. Yet, so inconvenient has the English practice been found, that the Real Property Commissioners, in their third report, have given their opinion against it; and in the 7th vol. of Jarman's edition of *Bythewood's Conveyancing*, the rule, as here contended for, is laid down. A covenant for the safe custody and production of the deeds is no security against the risks and losses incident to private possession, nor individual caprice.

The *Attorney General* and Mr. *James Hardey*, on behalf of Mr. Mahony, resisted the exceptions. They contended, that this court has no power to make provision in the Bank of Ireland for deeds. The Governor and Company of the Bank might refuse to receive them; and though received, the court could exercise no control respecting them, over persons who merely suffer the deeds to be deposited in their bank, and are unpaid and irresponsible. There is no record office in the bank, nor any officer for the purpose of regulating and preserving deeds. The consequence of this is, that there is the greatest difficulty in the way of finding deeds left there: and, in many cases, deeds lying there have been nearly obliterated by the want of proper care. It is therefore better to entrust the deeds to the person who has the largest interest in taking care of them, as reported by the Master, according to the settled practice in England. For any thing that appears upon the order in *Sanders v. Sanders*, only a portion of the estate may have been sold; and it may have appeared a hard thing to take the common title deeds from the inheritor, and give them to the purchaser of a part of his estate. But, in this case, the entire estate has been sold; and although it has been said, upon the other side, that the uniform practice in this court has been, to lodge in bank the common title deeds of several lots, no case has been produced in which that was done, where the entire estate has been sold, as here. The general practice cannot be doubted. *Dixon on Title Deeds*, 241; *Dare v. Tucker* (a); *Boughton v. Jewell* (b).

Mr. *Mullins*, in reply, said, that in the cases cited by the counsel for Mr. Mahony, the question now before the court did not arise; the question, in these cases, being, who should pay the costs of the attested copies of the common title deeds to which the purchasers of the smaller

(a) 6 Ves. 459.

(b) 15 Ves. 176.

lots were entitled, and not, as here, whether one of the purchasers should have the sole custody of the common title deeds. The settled practice of this court has been, in such cases, to order the deeds to be lodged in the Bank of Ireland, for the benefit of all the purchasers; and, upon the faith of that practice, the purchases under the decree in this cause have been made.

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The MASTER OF THE ROLLS intimated, when this case was mentioned, that Master Connor had communicated with him upon the subject, before making up his report; and that his Honor had entirely concurred with the Master, as to the proper finding. His Honor now said,

It cannot be denied that there are serious objections to giving to the purchaser of one lot the common title deeds of several lots; but the objections to the other course proposed are certainly not less pressing nor important. However, as it is said that the settled practice of the court has been as stated by the several purchasers in this case, and that the purchases had been made under that belief, I will direct an inquiry to be made, as to the practice, and in a few days make my order in this case.

*Monday, January 28th.*

This day, his Honor referred to the foregoing application, and said: I find, upon inquiry, that the practice as to the disposure of title deeds, common to several lots sold under a decree of this court, has not been uniform; and I still hold the opinion I have already expressed, as to the propriety of the Master's report.—No doubt, there are very serious objections upon both sides; but so many cases have occurred, within my own experience, of heavy loss and injury resulting from leaving deeds in the Bank of Ireland, that I am confident the risk, expense, and inconvenience of entrusting them to the purchaser of the largest lot, will be considerably less than what must follow from leaving them in the Bank. The *Trimleston* case, in which so much property was in question, fully shewed the mischievous consequences to be expected from leaving deeds in the bank; where, this court has no power to compel their admission, nor afterwards to secure their safety. In that case, when the deeds, after a laborious search, were produced, they were found to be so nearly destroyed by the want of necessary care, that one of the questions left to the jury was as to their contents. I therefore entirely agree with the Master, as to the propriety of his report, which is certainly according to the settled practice in England.

But as the English practice is usually under a condition of sale as to the deeds, which there is not in this case; and as it is here alleged, by a majority of the purchasers, that they purchased under the belief that the practice of lodging the common title deeds in bank, which appears some-

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times to have prevailed, was the settled practice of this court, and they object to any other disposure of them; I shall, therefore, in consideration of the peculiar circumstances of this case, vary the Master's report according to the second exception, without further reference. But I desire it may be generally understood, that what is done in this case is not to be a precedent for the future.

Order—The said Edward D. Stokes, S. E. Collis, Thomas Mullins, John J. Hickson, and Peter Thompson, having, by their counsel, insisted that when they respectively purchased under the decree in this cause, it was understood to be the practice of this Court, that unless a special condition of sale provided otherwise, title deeds and other muniments of title relating to lands sold under a decree of this Court, to several purchasers, and not relating exclusively to the lands purchased by any of them, should be lodged, under an order of this Court, with the privity of the Accountant General, in the Bank of Ireland, for the protection of such purchasers; and it appearing to the Court that such practice though not always followed, has prevailed in many cases: The Court doth order, that so much of the said report, bearing date the 30th of November, 1838, as finds that the common title deeds mentioned in the second schedule, to that said report annexed, should, when the charge of £20,000, in the said report mentioned, shall have been paid off, “be delivered to Pierce Mahony, who, in the event of paying off the said charge of £20,000, will be the purchaser of the largest lot; he covenanting with the purchasers of lots of inferior value, to produce the said deeds to them at all proper times, and at the expense of the parties requiring such production,” be set aside; and that the said common title deeds, shall, even if the said sum of £20,000 shall be paid by the said Pierce Mahony, be retained in the Bank of Ireland, when lodged there pursuant to the said report, for the benefit and security of all the said purchasers; with liberty for them respectively to apply to the court as occasion may require, in relation to the said deeds, or any of them. And, the Court doth declare, that this order is made in consideration of said special circumstances only; and not because the Court differs from the said Master, as to the propriety of having title deeds relating to lands, sold to several purchasers under a decree, delivered to the purchaser of the largest lot, on his executing proper deeds of covenant, binding himself and those deriving under him, to preserve said deeds, and to produce the same, on all proper and necessary occasions for the other purchasers, and that it is not to be consi-

dered that any such practice as has been insisted on by said purchasers, is to prevail in future.

The deposit to be paid back to the parties moving.\*

No costs.

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Friday, January 16th.

PRACTICE—APPOINTMENT OF NEW TRUSTEE, UNDER  
1 W. 4, c. 60, s. 22.

MITCHELL and another, petitioners, v. NIXON and another, Respondents.

Mr. WYNDHAM GOOLD, for the petitioners, moved that it might be referred to one of the Masters, to approve of fit and proper persons to be appointed trustees of the freehold estate of the testator Thomas Wray, in the petition mentioned, in place of the Rev. R. H. Nixon, and H. Bevan, who refuse to act; and that the said Nixon and Bevan might be directed to convey and make over the said freehold estate, to such new trustee or trustees as the court shall approve upon the trusts of the will.

This court will not appoint a new trustee under 1 W. 4, c. 60, s. 22, instead of a person who appears never to have accepted the trust, and refuses to act.

The affidavit to ground the present application stated, *inter alia*, that the respondents had never accepted the trusts, but always declined to interfere; and that they were within the jurisdiction.—Counsel submitted, that the present application was under the 1 W. 4, c. 60, s. 22, which is held to extend to trustees refusing to act, though not under any disability, and within the jurisdiction, *Johnston v. Anketell* (a).

MASTER OF THE ROLLS.—It is true, it has been held in the case you mention, and also intimated in the case of *Lord Mayo* (b), that the 22d section of this act extends to trustees refusing to act, though not under disability, and within the jurisdiction. But in this case there are no trustees: for it appears that the respondents not merely refuse to act, but that they never accepted the trusts; and, therefore, that no estate vested in them. This is quite settled by *Townson v. Tickell* (c), and several other cases, which, at this moment I cannot recall. Of course the 1 W. 4, c. 60, cannot apply to the present case.

No rule.†

(a) 5 Law Rec. N. S. 201. (b) 3 Law Rec. N. S. 224; and 1 Lloyd & Goold 118.

(c) 3 Baron & Ald. 1.

† See *In re Quinlan and wife*, Jones 519, and *in re Hopford and wife*, Jones 550; in *re Greene*, 3 Law Rec. N. S. 229.

\* In all cases of this kind, it is necessary before moving, to deposit £10, as security for the costs of resisting the application, if costs should be given against it.

Thursday, January 17th.

PLEADING—PARTIES—STATUTE OF LIMITATIONS—  
DEMURRER ORE TENUS.

JOHN DALY, administrator of JULIA KIRWAN, deceased, BRIDGET KIRWAN, administratrix of MARTIN KIRWAN, deceased, and MARTIN KIRWAN, administrator of RICHARD KIRWAN, v. PATRICK KIRWAN.

Where R, by his will, directed his executors to invest £1500, and to pay the interest to his wife during her life, and after her decease to divide the principal equally among his five children; and the will was proved by one of the executors only, who possessed himself of the assets, and set apart the £1500, and paid the interest to R's wife during her life, and also made some payments to the children; in a suit by the representatives of R's children for their respective shares of the £1500, upwards of thirty years after their right accrued, praying that the executor might be declared to have been a trustee of the £1500 for R's children;—*Held*, on demurrer, that this is a suit, not for a legacy, but for the execution of a trust; and the statute of limitations did not apply.

The bill stated, that Richard Kirwan, of Woodfield, in the county Galway, Esq., deceased, by his will, bearing date the 17th of April 1779, appointed his nephews, Richard Kirwan, Edmond Kirwan, and Martin Kirwan, executors thereof, and thereby willed and directed that his said executors, as soon as conveniently might be after his death, should place out at interest, in good and sufficient security, a sum of £1500, in their own names, or the name of the survivor of them, in trust, that they, or the survivor of them, or the executors or administrators of such survivor, should, yearly and every year during the life of the said testator's wife, Christiana Kirwan, pay her the interest thereof; and after the decease of the said Christiana, to divide it equally among his five children, the same to be paid and payable to them respectively at their ages of 21, or days of marriage. That the said testator, shortly after making the said will, departed this life, without altering or revoking the same, and leaving the said Christiana and his five children, issue of his marriage, viz., Martin Kirwan, Richard Kirwan the younger, Nicholas Kirwan, Margaret Morris, otherwise Kirwan, and Julia Kirwan, him surviving. That the executor, Martin Kirwan, alone proved the will, and possessed himself of Richard Kirwan's assets, to an amount more than sufficient to pay his debts, funeral expenses, and legacies, and assented to the said legacy of £1500 *and severed and set apart the said*

*Held*, also, that the executors of R's will, who did not prove, were not necessary parties.

M, being the executor who proved R's will &c., died, having, by his own will, appointed two executors, both of whom proved his will, and possessed themselves of his assets, to an amount more than sufficient to pay all his debts, &c. One of R's executors died, and the surviving executor admitted assets. In a suit by R's children for their shares of the £1500, against the surviving executor of M—*Held*, that the personal representative of the deceased executor of M was not a necessary party.

*Held*, also, that in this suit, all of the children of R entitled to the £1500, should have been before the court, and one of them having been left out, that the suit was defective.

Where the defendant demurred to the bill, assigning five causes; and the demurrer, in one of the causes suggested a *fact dehors* the bill, and another contained an inadmissible averment, the court overruled the demurrer on record—but *Held*, that, upon the hearing, the defendant was entitled to demur *ore tenus*, and newly assign some of the original causes; but that the party so demurring should pay the costs of the hearing.

sum of £1500 from the general assets of the said testator ; and for several years paid the interest thereof to the said Christiana, according to the trusts of the said will. That the said Christiana died in the year 1807 ; and that, during her lifetime, at her request, the said executor, Martin Kirwan, had paid Margaret Morris, otherwise Kirwan, one of the said children, her share of the said sum of £1500 ; and that some payments had been made on account of one or two of the other children's shares. That Nicholas Kirwan, another of the said children, died intestate in the year 1817 ; and that the plaintiffs being the representatives of the other three, viz., Julia, Martin, and Richard, who were dead, were respectively entitled to the sums due on account of their several shares of the said sum of £1500. That the said executor, Martin Kirwan, died in 1807, having, by his will, appointed his wife, Bridget Kirwan, the defendant Patrick Kirwan and Thomas Reddington, his executors ; and that the said Patrick Kirwan and Thomas Reddington proved the will, and possessed themselves of assets more than sufficient to pay the said sum of £1500, and all the debts of their said testator. That Thomas Reddington died in 1813, leaving the defendant Patrick Kirwan the surviving executor of Martin. That frequent applications had been made, by the plaintiffs, to the said Patrick Kirwan, to pay them the sums respectively due on account of the several shares of the said three children of the testator Richard, whom they represented.

The bill charged, *inter alia*, that the statute of limitations was no bar to the plaintiff's claim, inasmuch as Martin Kirwan, by assenting to the legacy, and paying the interest thereof to the said Christiana, had made himself a trustee for those who should enjoy it after her decease. That the defendant had in his hands sufficient assets of the said Martin Kirwan, to pay the residue of the said £1500, and had admitted the same, as appeared by the following letter, bearing date the 23d of June, 1811, and written by the said defendant to the plaintiff John Daly : " Sir—I do not feel myself justified in deviating from what I mentioned to you, that, until a regular statement is drawn out and signed by all parties, I cannot take upon me to say what proportion each of the children of the late Richard Kirwan is entitled to receive interest for ; nor do I think the letter Mr. Martin Kirwan has written is any security to me for paying any part of the money in question ; and I believe, that upon investigation of my uncle's papers, he will find that the sum is not so much as he states.—&c. &c. PATRICK KIRWAN,"—and also by another letter, bearing date the 4th of June, 1811, written by the defendant to the plaintiff Martin Kirwan : " Dear Martin—I received a letter from you this morning, by the hands of Mr. Daly, in which you desired me to pay to Mr. Daly a sum of £46, which, you say, is due to him, as interest ; but, as I have had many similar demands made to me by the family, I cannot pay any money to any of

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"them, till I see an account settled between them, so as to let me know what portion of the sum now remaining in my hands each of them is entitled to. I wish, when you come next to the country, that you would come here, and I will shew you the the papers, that you may settle amongst them, and let me know in what shares each of the children of Mr. Richard Kirwan is entitled to the balance of the money still remaining in my hands &c. &c." PATRICK KIRWAN,

The bill then prayed, that the testator Martin Kirwan, might be declared to have received the said £1500, as trustee for the said legatees of the said Richard Kirwan; and that an account might be taken of the assets of which the said Martin Kirwan died possessed, and into whose hands they came, and how they were disposed of; and that an account might be taken of what was due to each of the plaintiffs on foot of the £1500; and that if the defendant should appear to have possessed himself of the assets of the said Martin Kirwan, that he should be decreed to pay the plaintiffs respectively, such sums for principal and interest as should be found to be due to each of them.

To this bill the defendant demurred, and assigned the following causes:—

1st. That the executors of Richard Kirwan's will, who did not prove, should have been made parties.

2d. That the personal representative of the said Nicholas Kirwan, one of the legatees, who died intestate, should be a party.

3d. That the personal representative of the said Thomas Reddington, one of the executors of the said Martin Kirwan should be a party.

4th. That by the 3d and 4th W. 4, c. 27, no proceeding shall be brought to recover a legacy, but within twenty years after a present right, &c., to some person capable of giving a discharge, unless, &c.; and that it appeared by the bill, that Christiana Kirwan died in 1807, and that thereupon, the rights of those whom the plaintiffs represented accrued. *That they were then respectively capable of giving discharges for their respective proportions;* and that it did not appear that any proceeding had been commenced within twenty years against the defendant, and the said Thos. Reddington, as executors of Martin Kirwan, to recover the legacy; nor, that any payment was made after the death of Christiana Kirwan; nor, that any acknowledgment in writing had been given within twenty years by the defendant, or the said Thomas Reddington, to the plaintiffs, or those under whom they derived.

5th. That by the 10 Car. 2, no action of account shall be sued out unless within six years, &c.; and that it appeared that the plaintiffs' demand against the defendant, if any they had, *which defendant did not admit*, accrued more than six years before process was sued out against the defendant; and that the plaintiffs did not allege that the defendant

had promised or agreed to come to any account, or to pay the plaintiffs any of the sums of money claimed by their bill.

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Mr. O'Connor, for the demurrer.—The principal cause of demurrer rests upon the late statute of limitations as a bar to the plaintiffs' claim. By that statute, no action shall be commenced to recover any legacy, but within twenty years after a present right to receive the same shall have accrued. According to the statement in the bill, the right accrued upon the death of Christiana Kirwan, in 1807: and, even if the letters of the defendant should be admitted to be what they clearly are not, acknowledgments in writing within the meaning of the statute, they cannot avail, as twenty-seven years have elapsed since.—[MASTER OF THE ROLLS.—As you have opened the bill, this is not the case of a legacy, but of a trust, falling within the authority of a case in *Mylne and Craig's Reports*; and from the language of this bill, "that the executor severed and set apart the £1,500," I should think it was framed specially upon that case.]—The case alluded to by your Honor is that of *Phillipo v. Munnings* (a), which is distinguishable from the present. This case is more like *Prior v. Hornblow* (b), which is an express authority for the defendant.—[MASTER OF THE ROLLS.—I have no doubt that *Phillipo v. Munnings* overrules this cause of demurrer; you had therefore better apply yourself to the others.]

The Attorney General, who was with Mr. O'Connor, then consented to give up the causes of demurrer grounded on the statute of limitations.

Mr. O'Connor in continuation.—This suit is clearly defective for want of parties. Although all of the executors of Richard Kirwan did not prove the will, they should all have been made parties, *Yates v. Compton* (c).—[His Honor intimated that counsel need not dwell upon this point.]—The next cause of demurrer is, that the representative of Nicholas Kirwan, who was one of the children entitled to a share of the £1,500, should have been made a party; for it is a general rule, that all who claim a common interest in the fund should be before the court, that their rights may be ascertained, and the litigation may be final. *Hanne v. Stevens* (d); *Head v. Teynham* (e); *Lowe v. Morgan* (f). It is also clear, that the representative of Reddington, the co-executor of the defendant, should have been made a party: for, the bill expressly states, that he and the defendant proved the will and possessed themselves of assets. *Williams v. Williams* (g) is an express authority.

Mr. Collins Q. C., and Mr. Otway, in support of the bill.—The case of *Phillipo v. Munnings*, upon which, as your Honor has rightly sur-

(a) 2 Myl & Cr. 305.

(b) 2 Young & Col. 207.

(c) 2 P. Wms. 308.

(d) 1 Vern. 110.

(e) 2 Cox. 37.

(f) 1 Bro. C. C. 263.

(g) 9 Mod. 299.

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mised, this bill was framed, expressly decides that the late statute of limitations does not apply to a case like this. However, it is now unnecessary to give any answer to the objections grounded upon the 3 and 4 *W. 4*, and 10 *Car. 2*, as they have been abandoned; and the case upon the other side is confined to the alleged want of parties. As to this, the causes of demurrer are three:—

The first is, that the executors of Richard Kirwan, who did not prove his will, are necessary parties. This is plainly untenable; and after the intimation which has fallen from the court, may be passed over without further notice.

The second is, that the representative of Nicholas Kirwan should have been made a party. The cases cited, to maintain the demurrer upon this ground, only go to shew what we are quite willing to admit; *i. e.*, where there are several *cestuis que trust*, who have a *unity* of interest in a common fund, or in a charge on real estate; or, where the fund is unascertained, as in the case of a residue, all the persons interested in it should be parties. But the case appearing upon this bill is very different: here, the fund was the ascertained sum of £1,500; and the five children of Richard Kirwan were entitled to aliquot shares of it. Their rights were perfectly distinct and independent: so that each might sue alone, according to the express authority of *Smith v. Snow (a)*. [MASTER OF THE ROLLS. This is, I think, the point of the case which most presses you; your bill states, that one of the daughters of Richard Kirwan received her share; and that some payments have been made on account of the other shares: therefore, the fund out of which the plaintiffs seek payment is not ascertained. It is further observable, that the bill *prays an account* of what is due to each of the plaintiffs. But, in the case just cited, the fund was ascertained; and the several sums, which the persons interested in it were respectively entitled to receive, were also ascertained.]—The payments, stated in the bill to have been made, were distinct payments on account of distinct rights. The inequality of the payments to the several *cestuis que trust* shews the total independence of their several demands, which are not altered in their nature by the reduction of the general fund. It is true, an account is prayed of what is due to each, because each may have received different amounts of payment; and therefore, to each a different sum may be reported due. But the right of each is not on this account the less certain or distinct: for each is certainly entitled to one fifth of £1,500, after giving credit for the sums respectively received. We therefore submit, that this case comes exactly within the authority of *Smith v. Snow*, the principle of which is laid down and insisted on by several text writers, *Story's Eq. Pl.* 156; *Calvert on parties* 124.

The third and last objection remaining to be considered, is, that the re-

(a) 3 *Mad.* 10.

presentative of Reddington, the deceased co-executor, should be a party. This objection cannot be sustained. The case of *Williams v. Williams* (a), does not apply: there the heir-at-law was the principal defendant, and he was not liable, unless the personalty of the testator should prove insufficient; therefore it was plainly necessary to have before the court all who had received the personalty and could give an account of it. But in the case now before the court, the surviving executor must be regarded as admitting assets of Martin Kirwan in his hands, sufficient for the execution of the trust created by the will of Richard Kirwan; and therefore a decree, according to the prayer of the bill, could not give to the defendant any right over against the representative of Reddington; *Ryan v. Roche* (b); *Moore v. Blake* (c).—[MASTER OF THE ROLLS. There was a case of this kind in the Exchequer some time ago, and the court held that it was unnecessary to make the representative of the deceased co-executor a party.—Mr. Cooper, I remember, was in the case, and he, probably, could furnish you with the particulars of it\*.]—But this is a still stronger case: here is a trust, and if both Reddington and the defendant received assets as it is charged they did, then they were trustees for the same amount as their testator was trustee, and might be sued separately, *Walker v. Symmonds* (d); *Routh v. Kinder* (e); *Wilson v. Moore* (f).

But, whatever may be the opinion of the Court upon the question of parties, this demurrer is clearly informal and must be overruled. It is a *speaking* demurrer: for it states a fact not to be found in, nor even to be inferred from the bill, viz.: that upon the death of Christiana Kirwan, the several *cestuis que trust* were respectively capable of giving discharges, &c.; and upon this fact the cause of the demurrer as to the 3 and 4 W. 4, rests. It is observable too, that this fact, if true, would be, according to the defendant's view of the case, an answer to the whole bill, and so must overrule the demurrer. It is a settled rule, that a demurrer which suggests a fact is bad *in toto*.

MASTER OF THE ROLLS. I am disposed to agree with you, that this demurrer is so informal that it must be overruled; but if this be so, I think the defendant may now demur *ore tenus* and rely upon the want of parties.

The *Attorney General*, in reply.—The alleged informality of this demurrer is confined to the cause which relies upon the statute of limitations. At any rate, if the court should be disposed to allow the objection, it can only raise a question as to costs; for we may, and do now demur *ore tenus*, and rely upon the causes already assigned as to the want of parties.

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\* Short v. Judge, see post p. 162.

(a) 9 Mod. 296.

(b) 2 Mol 437.

(c) 1 Mol. 281.

(d) 3 Swanst. 75.

(e) 3 Swanst. 144.

(f) 1 Myl. & Kee. 142.

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It is a well settled rule that the *cestuis que trust* of a common fund must be parties. *Smith v. Snow* is not an authority for this case, where an inquiry must be had to ascertain the fund, and the sums which the plaintiffs are respectively entitled to receive out of it. Otherwise, there would be a multiplicity of suits, and the defendant might, after successfully resisting the present plaintiffs, be vexed with another suit by the representative of Nicholas Kirwan, who is entitled in the same right with the plaintiffs, and should have been made a party.

The representative of Reddington is also a necessary party. In *Scully v. Scully*, this court held, that the representative of a deceased executor should be before the court, as well as the surviving executor who dealt with the assets.—[MASTER OF THE ROLLS. I do not think the question was directly before the court in *Scully v. Scully*.]—At any rate, there is in this bill an express charge that Reddington received assets. The prayer is, that an account may be taken of the assets of Martin Kirwan; and that it may be ascertained into whose hands they came, and how they were disposed of. Whether this prayer was necessary, for the case of trust insisted on at the other side is another question; but here the pleader is bound by it; and upon this demurrer, the question is, not as to the necessity of such an account, but, how can such an account be taken in the absence of the personal representative of Reddington? The construction which the bill seeks to put upon the letters of the defendant cannot be maintained: for he does not thereby admit of assets sufficient to satisfy the plaintiff's demands.

After the *Attorney General* concluded, Mr. *Osway* informed the court, he had communicated with Mr. Cooper, respecting the case in the Exchequer, to which his Honor had alluded in the course of the previous discussion; and that he had learned the following particulars respecting it. The name of the case was *Short and others v. Judge*. It was suit against the survivor of two executors, who both proved the will; though the deceased executor alone had interfered and dealt with the assets. The bill sought an account against the surviving executor only; and when the case first came before the court, (Lord Guillamore being then Chief Baron), their Lordships thought, that the representative of the deceased executor was a necessary party. The bill was accordingly amended, by making the additional party; but, upon the final hearing, (the late Chief Baron Jor having in the mean time taken his seat), the court decided, that the representative of the deceased executor had been improperly brought before the court.\*

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\* This case is not reported, and as *See Holland v. Prior* (not cited), above stated seems to go very far.— 1 Myl. & Kee. 237.

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THE MASTER OF THE ROLLS, on this day, delivered the following judgment:—after stating the contents and prayer of the bill, and having particularly noticed the admissions of the defendant in his letters of the 4th of June, and the 29d of June, 1811, as to “the money still remaining in his hands,” to satisfy the demands of the persons entitled to the shares of the £1,500, his Honor proceeded.

To this bill, the defendant has demurred, assigning five causes: the first, second, and third are for want of parties; the fourth relies upon the late statute of limitations; and the fifth upon the old statute, 10 Car. 2.—This is not a suit for a legacy, but as against the representative of a trustee for a breach of trust, and comes precisely within the authority of *Phillipo v. Munnings* (a), upon the judgment in which, the bill here was confessedly framed: the statutes of limitation, therefore, do not apply. But, it is material to consider the manner in which the demurrer relies upon them, as it was urged, that this is a *speaking* demurrer.

After stating the effect of the new limitation act, 3 & 4 W. 4, c. 27, the demurrer goes on to say—“that it appears, by the bill, that Christiana Kirwan died in 1807, and, that thereupon the rights of those whom the plaintiffs represent accrued; and *that they were then respectively capable of giving discharges*,” &c. Again: when relying upon the old limitation act, 10 Car. 2, the demurrer states, “that it appears, by the bill, that the plaintiffs’ demands against the defendant, *if any they have, which this defendant does not admit*, accrued more than six years before process sued out,” &c. Now, it does not appear by the bill, that, upon the death of Christiana Kirwan, the persons entitled to the distributive shares of the £1,500 were capable of giving discharges; and, therefore, the statement to that effect in the demurrer must be regarded as the suggestion of a material fact *dehors* the bill, upon which the demurrer relies, and which, according to the defendant’s view of the case, would be an answer to the whole bill. But it *does* appear, by the statements in the bill, and by the admission of the defendant himself, in his letters shewn upon the bill, that the plaintiffs *have* demands against the defendant; and his demurrer, relying on the 10 Car. 2, was bound to admit this. Yet, the language of the demurrer is, “that the plaintiffs’ demands against the defendant, *if any they have, which this defendant does not admit*.” This is a positive refusal of what the demurrer was bound to admit; and, if it is to be taken as an averment, that the plaintiffs have not demands against the defendant, this statement also would go to answer the whole bill. According to the authority of *Esdell v. Buchanan* (b), which is very like the case now before the court—(his Honor fully stated it)—and also, the case of *Cawthorne v. Chatie* (c), in

(a) 2 Myl. & Cr. 39. (b) 4 Bro. C. C. 254, and 2 Ves. jun. (c) 2 Sim. & Stu. 129.

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which the Vice Chancellor says, "A speaking demurrer is, where, by "way of argument or inference, the demurrer suggests a material fact "not to be found in the bill,"—this demurrer must be overruled.

But the defendant's counsel, anticipating the judgment as to the demurrer on record, demurred *ore tenus*, relying on the causes originally assigned, as to the want of parties. 1st. That the representative of Reddington, the deceased executor of Martin Kirwan, who was the sole acting executor of Richard, should be a party. 2d. That the representative of Nicholas Kirwan, who was one of those entitled to a distributive share of the £1,500, should also be a party.—Before the court can adjudicate upon these objections, it is necessary to determine the preliminary question, Whether or not this demurrer *ore tenus* can be permitted?

In the case of *Bowman v. Lygon (a)*, it is laid down, that a demurrer *ore tenus* must be upon new grounds, and not, where a demurrer on the same point has been already overruled. On the other hand, in the case of *Pitts v. Short (b)*, the Chancellor says, "A demurrer *ore tenus* must "be to that which has already been demurred to on the record, but cannot be upon new grounds." Certainly, it is not easy to reconcile the seemingly contradictory decisions in these two cases. However, I think, the judgment in the former case cannot be understood to mean more than that, where, for defect of substance, a demurrer is overruled, the party shall not be entitled, by demurring *ore tenus*, to re-argue the old case. He must present a case substantially different, and, as respects the question before the court, change his ground. But, according to the authority of *Pitts v. Short*, the new case must be *ejusdem generis* with the old, and cannot take a ground absolutely different. The decision in *Anstruther's Report* plainly applies only to cases of defect in substance, and not where the demurrer has been overruled in consequence of a defect in form only. I therefore take the rule to be, that a demurrer *ore tenus* shall not be a re-argument of points already decided, but that a party shall not, by means of an illusory or inadmissible demurrer, be enabled, at the hearing, to surprise his opponent by a totally new ground of objection, which, if allowed, might be kept back for the purpose of a surprise; or, in other words, where the demurrer on record is bad in substance, there may be a demurrer *ore tenus* upon new causes; provided, they be so related to the causes upon record, that the opposite party must be held to have reasonable notice of them. But where, as in this case, the demurrer is overruled for defect of form only, the party may, *ore tenus*, demur upon the old causes; of course, provided he avoids the irregularity. Such being my opinion on the preliminary question, I am bound to give my judgment upon the questions which have been raised.

(a) 1 Anst. 4.

(b) 17 Ves. 215.

The first question is, Whether or not the representative of Reddington is a necessary party?—In my opinion, he is not. The cases of *Williams v. Williams* (a), and *Yates v. Compton* (b), are not like this case, and do not apply. Here, it is stated, and must be taken as admitted, that the defendant has assets sufficient to satisfy the plaintiffs' demands; and the prayer of the bill is, that if he shall appear to have received assets of his testator, he may be decreed to pay the amount claimed by the plaintiffs. It is true, it appears by the bill that both Reddington and the defendant proved Martin Kirwan's will, and received assets; and the bill prays, among other things, that an account may be taken of the assets of Martin Kirwan. But the generality of this latter prayer must be confined to the liability of the defendant, against whom only any relief is sought. The defendant here is sued, as a trustee, for a breach of trust; and, in such cases, it has been held, that it is not necessary to join all the trustees, where it is sought to charge only one. *Ex-parte Angel* (c); *Walker v. Symmonds* (d); *Wilson v. Moore* (e). The judgment of the Vice Chancellor, in *Munch v. Cockrell* (f) appears to be against the doctrine just stated; but I cannot hold that the decision of Lord Eldon, in *Walker v. Symmonds*, has been overruled by it. Besides, it does not appear, nor is it even suggested, in this case, that Reddington, at the time of his death, had any of Martin Kirwan's assets in his hands, or that he did not account; and the relief here sought is only as to the assets which may be found to have come to the hands of the defendant. On the whole, as respects the objection now under consideration, this case is like *Selyard v. Executors of Harris* (g), (which his Honor fully stated,) which, with *Moore v. Blake* (h), and *Ryan v. Roche* (i), are authorities against this cause of demurrer.

The remaining objection is, that the representative of Nicholas Kirwan is a necessary party in this suit. It is stated in the bill, that this Nicholas Kirwan was one of the *cestuis que trust* equally entitled to the £1,500; but it does not appear that his share had been paid, nor that we shall not presently have another suit upon that account. Against this objection, the counsel for the plaintiffs have relied upon the case of *Smith v. Snow*; but that case, if it be followed (which I very much doubt), can apply only to a similar state of facts. I confess, that when I consider the vexatious multiplication of suits, and the difficulties respecting costs, which would follow from the doctrine, that *cestuis que trust*, equally entitled to a common fund, may institute distinct suits for their several shares, I cannot easily adopt the opinion of Sir John

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(a) 9 Mod. 299.

(c) 2 Atk. 164.

(e) 1 Myl. &amp; Kee. 143.

(g) 1 Eq. Cas. Ab. 74.

(b) 2 P. Wms. 308.

(d) 3 Swanst. 75.

(f) 8 Sim. 231.

(h) 1 Mol. 231.

(i) 2 Mol. 437



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Leach in that case, that the *inconvenience of seven cestuis que trust* filing seven bills, to compel their trustees to execute the trust *by parts*, would not be so great, as that of allowing some of the *cestuis que trust* to file their bill for their own shares, making the others, who were unwilling to join in suit, parties defendant. However, that case is plainly distinguishable from this. There, both of the trustees were defendants, and the *cestuis que trust* were entitled to aliquot shares of an ascertained fund. But here, one of two trustees is sought to be made liable for the whole amount of the trust fund; and we do not know either the amount of that fund, nor of the particular sums which the plaintiffs are respectively entitled to receive out of it. I am, therefore, of opinion, that the representative of Nicholas Kirwan was a necessary party in this suit, and that I must allow the demurrer *ore tenus* upon that ground.

But, as the demurrer on record has been overruled, the defendant must pay the costs of the hearing; and, if the plaintiffs choose to apply now for leave to amend their bill, either by making the representative of Nicholas Kirwan a party, or by stating further facts, to shew that he is not a necessary party, I will make it part of my order, that they shall be at liberty to do so. I will add, that the defendant's case appears to me to be a very unrighteous one, and I hope the court shall hear no more about it.

Mr. Collins, for the plaintiffs, having, accordingly, applied for leave to amend the bill in the manner mentioned by the court—

Order.—The plaintiffs' counsel having objected to the form of the demurrer, the Court doth, on that objection, overrule the demurrer filed by the said defendant; and the defendant having, by his counsel at the bar, objected to the said bill, that the personal representative of the said Thomas Reddington, in plaintiffs' bill named, was not made a party, although he was a necessary party in this suit; and also, that the personal representative of said Nicholas Kirwan, also in the plaintiffs' bill named, was not named a party thereto, though he was a necessary party:—The Court doth overrule the first of the said objections; and as to the second, doth declare that the said plaintiffs shall be at liberty to amend their bill as they may be advised, by making the personal representative of the said Nicholas Kirwan a party in this suit, or by stating such further facts, as shew that he is not a necessary party.

And let the said defendant pay to the plaintiffs the costs of this hearing.

## EQUITY EXCHEQUER.

*Saturday, November 17th, and Wednesday, December 5th, 1838.*

**DOWER—JOINTURE—STATUTE OF LIMITATIONS, 3 & 4  
WM. 4, c. 27—PRACTICE—AMENDED BILL.**

**JAMES SMITH, Executor of MARGARET WALSH, deceased,  
v. A. R. WALSH and another.**

The original bill in this cause was filed on the 28th day of December, 1833, by the testatrix, Margaret Walsh, conjointly with her younger children, against the present defendants.

The bill stated, that Richard Walsh, being seized in fee simple, or otherwise well entitled to the lands of Tullamaine, by indenture, bearing date the 3d of February, 1785, executed on his marriage with the plaintiff Margaret Walsh, charged the said lands with a jointure of £60 per annum for his wife, and with certain other sums, to be divided among the younger children of the marriage, in such shares and proportions as he should, by deed or will, appoint. It was further stated, that Richard Walsh died in the year 1795, having previously made his will, whereby he confirmed the settlement, and exercised his power of appointment in favor of his younger children. The bill then stated, that the plaintiff's jointure was regularly paid by her son, the defendant, A. R. Walsh (who became entitled to the lands of Tullamaine under the limitations of the settlement), until the year 1811, since which period no further payment had been made. The bill, accordingly, prayed that the trusts, both of the settlement and of the will of Richard Walsh, might be carried into execution, and that an account might be taken of what was due to the plaintiff Margaret on foot of her jointure, since the year 1811, as well as of the several sums due to the other plaintiffs in respect of the legacies bequeathed to them by their father's will, &c.

The defendant, A. R. Walsh, by his answer, alleged, that his father, the said Richard Walsh, at the time of the execution of the settlement, was tenant in tail only of the lands of Tullamaine; and that, having done no act to bar the entail, he was consequently incompetent to settle a jointure, or make any provision for younger children, beyond the period of his natural life; and, in proof of that allegation, the defendant relied on certain deeds set forth in the answer.

Bill filed by a widow, to raise the arrears of a jointure charged upon certain lands by her marriage settlement.

The defendant, by his answer, denied the husband's power to jointure, alleging, that at the time of executing the settlement, he was seized of an estate tail only, which had not been subsequently barred.

An amended bill was then filed, praying for dower, in case the plaintiff were not considered entitled to jointure. Defendant neither answered the amended bill, nor appeared on the hearing, when the court decreed the plaintiff entitled to dower, and directed

an account of the arrears—*Held*: that the amended bill was a continuation of the original suit; and that in taking the account, the defendant could not set up, in the office the 3 and 4 W. 4, c. 27, s. 40, limiting the recovery of the arrears of dower to a period of six years, although the amended bill was not filed until after the 31st December, 1833, (when that act came into operation), the original bill having been filed previously thereto.

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By an order of the 27th of November, 1834, the plaintiff Margaret Walsh obtained leave to amend the bill, by striking out the names of the other plaintiffs, and otherwise amending the same, according to her rights and the facts disclosed by the defendant A. R. Walsh's answer. She accordingly filed an amended bill on the 9th of December, 1834, thereby praying, that in case the court should be of opinion that she was not entitled to the relief prayed by the original bill, she might be declared entitled to dower.

The defendant, A. R. Walsh, did not answer the amended bill, and the plaintiff, having proceeded with the cause to a hearing, obtained a decree, whereby, after reciting that A. R. Walsh had, by his answer, insisted that his father was tenant in tail, and that the plaintiff had elected to take dower, the court decreed her entitled to dower, or thirds, out of the lands of Tullamaine, in the pleadings mentioned, and referred it to the Officer to compute the sum due for arrears.

Margaret Walsh having died subsequently to the time of pronouncing the decree, the suit was revived in the name of the present plaintiff, as her executor. The defendant A. R. Walker (who had not appeared on the hearing,) appeared in the office, and insisted that, under the 3 & 4 W. 4, c. 27, s. 40, the plaintiff, as executor of Margaret Walsh, was entitled to recover the arrears of dower during six years only, next before her death; but the Officer reported, that, inasmuch as the original bill had been filed on the 28th of December, 1833, before that act came into operation, he found that there was due to the plaintiff, as executor of Margaret Walsh, the sum of £2600 on foot of her dower, being for 26 years thereof, from the 1st of January, 1812, to the time of her death. Upon this ground, an exception was taken to the Officer's report, by the defendant Walsh.

Mr. *Moore*, Q.C., in support of the exception.—The question altogether turns upon the plaintiff's right to refer the bill filed on the 9th of December, 1834, to the filing of the original bill on the 28th of December, 1833. It is submitted, that the plaintiff cannot, by filing what is called an amended bill, but what is, in reality, a new and distinct bill, containing a case totally different from, and inconsistent with, that put forward by the bill as originally filed, deprive the defendant of the benefit of the recent statute of limitations.

Mr. *Smith*, Q.C., and Mr. *Casserty*, for the plaintiff.—If the amended bill is to be referred back to the filing of the original bill, and to be considered as the continuation of the former suit, and not as the commencement of a new one, the 3 & 4 W. 4, c. 27, which did not come into operation until after the 31st of December, 1833, cannot affect the plaintiffs'

claims. *Paddon v. Bartlett* (a). The cases made by the two bills are not so variant as to prevent them from being considered as forming but one record, *Peed v. Cussen* (b). The amended bill in this case must be taken to be a continuation of the original bill, *Harrison Chan. Prac.* p. 66; *Willis v. Evans* (c). The plaintiff Margaret Walsh, by the original bill, informed the defendant of her claim to jointure; the bill filed, and subpoena served, were a *lis pendens*, and notice to all the world, *Anon* (d). Moreover, the plaintiff having been led into a mistake of her rights by the conduct of the defendant himself, in continuing to pay her jointure for a period of 17 years, the court will give her that relief to which she is entitled, *Lindsay v. Lynch* (e). Before the recent act, there was no limitation to a claim of the arrears of dower, *Oliver v. Richardson* (f).

Mr. Warren, Q.C., in reply.—*Peed v. Cussen*, when considered, will not be found applicable to the present case. It is said, that the filing of the original bill, and the service of the subpoena, constituted a *lis pendens* and notice to all the world; this affords a fair test by which the question can be tried. If, after the filing of the original bill by Margaret Walsh, for the recovery of her jointure, the defendant A. R. Walsh had sold the lands of Tullamaine, subject to the plaintiff's rights under the settlement of 1785; could it be contended that the purchaser would have been affected by the claim of dower subsequently set up by Margaret Walsh? The very foundation of the plaintiff's claim of jointure was, her having abandoned her claim to dower.—[RICHARDS, Baron.\* She only abandoned her claim to dower conditionally. The moment the right to the latter is established, the abandonment of the former is complete, but not until then.]—At all events, when she instituted a suit for jointure, she postponed her claim of dower, and when she subsequently elected to take the latter, she must have taken it, subject to all the disadvantages consequent on the postponement of the claim. On the question of the amendment, he referred to *Leigh v. Leigh* (g) and *Foot v. Collins* (h).

Wednesday, December 5th.

RICHARDS, B., on this day gave judgment.

After stating the exceptions, and the several proceedings in the cause, his Lordship observed, that the original bill had been filed before the

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(a) 5 Nev. & M. 383; S. C. 3 Ad. & L. 884.

(b) 1 Sausse & Scul. 161.

(c) 2 Ball & B. 227.

(d) 1 Vern. 318.

(e) 2 Sch. & Lef. 9.

(f) 9 Ves. 222.

(g) 2 Bing. N. C. 464.

(h) 1 Mylne & Cr. 250.

\* Sitting alone. *Vide ante*, p. 116, note.

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statute of the 3 and 4 W. 4, c. 27, had come into operation. There were authorities to shew, that Courts of Law permitted parties to amend their writs, where the plaintiff's demand would otherwise have been barred by the statute of limitations. Upon this point, his Lordship referred to the cases of *Horton v. the Inhabitants of Stamford* (a), and *Larkin & others v. Massie* (b). In this case, he was of opinion there had been abundant grounds for allowing the plaintiff Margaret Walsh to amend her bill. Besides, it would be an act of gross injustice to that lady, or her representative, to permit the defendant, after having allowed her to proceed to a hearing with the cause, to turn round in the office, and, without any previous intimation of his intention, defeat her claim, by the case there for the first time attempted to be set up. This was not the kind of question which properly fell within the jurisdiction of the officer. If the defendant had sought to bar or limit the plaintiff's rights, he ought to have made his case before the court. In the ordinary case of a creditor coming into the office, the officer was bound to decide the questions connected with his claims; but in a matter in dispute between the parties in the cause, as in the present instance, the case was altogether different. In his Lordship's opinion, the officer was right in allowing the arrears of dower for the full period claimed by the plaintiff, notwithstanding the objections made on the part of the defendant. He would, therefore, overrule the exception; but, under all the circumstances, it should be, without costs on either side.\*

(a) 3 Tyrw. 869.

(b) 4 Tyrw. 839.

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\* The judgment of the learned Baron has been given *ex relatione*, the Editor not having been in court at the time it was pronounced.

## CHANCERY.

*Thursday, January 17th.*

## SOLICITOR AND CLIENT—GIFT—FRAUD.

ROSS v. STEELE.

This was a suit by a nephew against his uncle, a solicitor, to set aside a bond for £920, which the nephew alleged his uncle had obtained from him by fraud.

The case made by the uncle was, that the bond was executed to him by his nephew, as a *gift*, from motives of generosity, and that he was not his nephew's solicitor at the time.

The bill was filed 24th April, 1838, and prayed the court to declare the bond and the warrant of attorney to confess judgment on it fraudulent and void, and to compel the defendant to deliver them up to be cancelled.

The bill stated, that the plaintiff, at the date of the bond and warrant, 15th April, 1829, was a very young man, much under the influence of his uncle the defendant, with whom he had for a long time resided, and that being only just of age, and having only three days before succeeded to a property of £900 a-year, by the death of his elder brother, he consulted with the defendant as to the steps necessary to take out administration to his deceased brother. That accordingly, three days after his brother's death, the defendant requested that he would accompany him to *The Four Courts*, in order to sign a document, for the purpose of taking out administration, and that he accordingly signed a paper writing presented to him by the defendant, without reading it, which he had lately discovered to be, in fact, a money bond and warrant of attorney, purporting to secure the payment by the plaintiff to the defendant, of a sum of £920, with interest.

The bill also stated, that the plaintiff never was indebted in any sum of money to the defendant; that the bond was wholly without consideration, and that he signed the paper through confidence in the defendant, who, he stated, was at the time of the transaction his attorney.

And as evidence that plaintiff was not indebted to defendant, he put in issue and proved a settled account, dated 12th April, 1833, by which, a balance of £110. 0s. 4½d. was admitted due by defendant to plaintiff.

The defendant in his answer swore, that the bond was a gift from the plaintiff, for attention and care bestowed on him in his youth, by the

Bond passed by a nephew to his uncle a solicitor, who had brought him up, though admitted to be without pecuniary consideration, not set aside on bill by the nephew alleging fraud though the transaction was suspicious.

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defendant; that the statements in the bill, as to the defendant substituting an instrument and deceiving plaintiff, were wholly false; that the plaintiff was twenty-six years of age at the time; that the defendant had not been the attorney of the plaintiff, and that the account settled in 1833 related to transactions independent of the bond.

The bond in question was proved in the cause, by one of the attesting witnesses, who swore, that the plaintiff deliberately perused the document before signing it. The other subscribing witness was dead.

There was no evidence to shew that the defendant was the attorney of the plaintiff, at the time of the execution of the bond and warrant, but it appeared that about nine months afterwards, there was an action at law brought against the plaintiff, in which one Frayne was the attorney on record for the present plaintiff, but notices were produced, in the hand-writing of the present defendant, though bearing the signature of Frayne, which had been served in the course of those proceedings, on behalf of the present plaintiff.

There was no evidence of the allegation in the bill, that the bond had been substituted for an administration bond, in order to defraud the plaintiff.

Messrs. *Warren*, Q. C., *Litton*, Q. C., *T. B. C. Smith*, Q. C., and *Fitzgibbon* for the plaintiffs.

The defendant having been *in loco parentis*, the same strictness will be applied as if the relation of guardian and ward had existed between the parties, *Revett v. Harvey* (a). A gift from a ward to his guardian, or from client to attorney, will be set aside, even without proof of fraud, unless not only the relation has ceased, but the influence caused by the connexion must also have ceased, *Wells v. Middleton* (b); *Montesquieu v. Sandys* (c); *Wood v. Downes* (d). At all events, the circumstances of suspicion in this case are sufficient to induce the court, at least, to direct an issue, to inquire into the circumstances of this alleged gift.

Mr. *Keatinge*, Q. C., Mr. *Blake*, Q. C., and Mr. *Hunter* for defendant.

There is no fiduciary relation here between the parties. It is the case of a nephew, in possession of a considerable estate, and in much better circumstances than his uncle, making a gift to his uncle of £900. It is not the case of an *expectant heir*. He was in possession of his property.

Nor, is this a case of *guardian and ward*, for although the plaintiff

(a) 1 Sim. & Stu. 502.

(b) 1 Cox. 112, cited by Lord Eldon, 9 Ves. 24; 12 Ves. 372; 13 Ves. 52, 138; 18 Ves. 126.

(c) 18 Ves. 312.

(d) 15 Ves. 127.

lived with the defendant, he was twenty-six years old when this bond was executed.

Nor, is it a case of attorney and client, for there is no proof that defendant was plaintiff's attorney at the date of the bond; the only proofs of his acting as his attorney are the notices in his hand-writing, which bear date nine months after the transaction of the bond. Therefore, when the transaction occurred the relation did not exist.

In *Harris v. Tremenhere* (a), Lord Eldon dismissed a bill, filed to set aside certain leases made by the client to the attorney out of friendship, although it was admitted to be pure gift.

The plaintiff has failed in establishing, by proofs, the allegations of the bill, as to the substitution of one instrument for another. He has also put interrogatories on the files of the court, for the purpose of proving the defendant guilty of immorality, and also indictable offences in other transactions, which have nothing to do with the case.

LORD CHANCELLOR. I think I would not be justified in giving either a decree to set aside this instrument, or an issue, whether it was fraudulent or not.

Steele is not coming forward here, to claim any relief or assistance from this court, in respect of this security. If he came here as a plaintiff to seek the interposition of the court, to get rid of a legal bar, it might be different. There are, undoubtedly, circumstances of suspicion, but he is brought here as a defendant, and before I can grant the decree sought by the plaintiff, I must have evidence to satisfy my mind, that the defendant has been guilty of the fraud. And I must also consider, that the bill here is filed in 1837, to set aside a transaction in 1829.

And the case in *Simon and Stuart* is quite a satisfactory authority, to shew that the failure of the plaintiff, to establish a particular fact, charged by his bill, should not prevent him from obtaining relief if entitled to it, on the facts substantially put in issue, but here the plaintiff has failed in establishing substantially any case which would entitle him to have this instrument set aside.

Undoubtedly, there are suspicious circumstances in the case. Here is a bond, obtained three days after the plaintiff came into his property by his brother's death. It is admitted, that no consideration passed, and the case made is, that it was a *gift* from the nephew to the uncle. Certainly, that appears to be a hasty and indelicate proceeding, but, still, that haste only raises suspicions; it does not establish fraud. Besides, the plaintiff was no infant; he was twenty-six years of age, and it is proved in the cause, that he is capable of managing his own affairs. No doubt, some influence must have been acquired over him by his

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The party in possession of the legal right is entitled to put his antagonist on strict proof of fraud, before the court can relieve or direct an issue. Suspicion of fraud is not sufficient.



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uncle, who had been *in loco parentis*, and in whose house he was residing, when he became entitled to an estate of £900 a year. He had received acts of kindness from his uncle, and he gave him this bond. There is hastiness in the transaction, but I cannot say I have any ground, merely from the abruptness of it, to set it aside as fraudulent. It was a pure gift.

If there had been an *account*, and no opportunity given of going into the account, and if this bond had been passed in payment of a balance claimed on foot of an account thus remaining unascertained; in such a case, the shortness of time would be very material, but this transaction is to be sustained as a case of bounty.

Then, it is said, that the *account* settled in 1833 shews, that the defendant was conscious that this bond could not be sustained as a *bona fide* transaction; but, I think, that on looking to the items of that account, it is quite reconcileable that the bond, which was a separate transaction of itself, should not be introduced into that account; and it appears, from the answer of the defendant, (which the plaintiff has made evidence,) that it was agreed between them, that the balance should be set off against the bond. No demand appears to have been at any time made by the plaintiff on foot of that balance, which is consistent with the defendant's case, and inconsistent with that set up by the plaintiff, that he was ignorant of the nature of the bond.

The plaintiff has also failed in establishing the relationship of attorney and client at the time of the transaction; and although it appears that, nine months afterwards, the defendant was acting as attorney for the plaintiff, and was employing the names of other attorneys while he was so acting, which created a great suspicion in my mind, yet this is only suspicion; and it seems he could only have been acting as his attorney in the character of a friend, for he never claimed any costs. And, even if he was the paid attorney at a period subsequent to the transaction, yet, the transaction, having taken place previously, would be good. If there were a *pending suit*, it would be different. An attorney cannot be allowed to go half way up the hill with his client, and then say, I will let you roll down, unless you make me a present. A gift, if there was a pending suit, would be set aside, but this does not appear to be that case. As to the defendant having been receiving the plaintiff's rents from the time he succeeded to the property, no rents could have accrued at the period at which the bond was executed.

The interrogatories, which were exhibited with a view of impeaching the defendant's character and conduct in other transactions, and charging him with forgeries and immorality, were wholly impertinent and indecent; and I am bound to visit the costs upon the plaintiff.

Bill dismissed, with costs.

*Monday, January 21st, 1839.*

PRACTICE—PROLIX EXCEPTION.

VEREKER v. Lord GORT.

An exception to the Master's Report in this cause having been read, and appearing extremely long and argumentative,

The LORD CHANCELLOR said—This exception is filled with arguments which are properly matter for the counsel who are to argue it. I cannot allow the files of the court to be loaded with these argumentative exceptions. I certainly will visit the costs of this exception on the party who has taken it. The last three lines of it contain all that was necessary to be stated.\*

If exception to report be argumentative, court will visit the costs of it on the party taking it.

\* See *Blotch v. Purser*, *ante*, p. 34.

*Tuesday, January 22d.*

WILL—CODICIL—LEGACY—CHANGE OF CURRENCY  
BETWEEN WILL AND CODICIL.

HAMILTON v. CARROLL.

The original bill in this cause was filed the 24th December, 1833. The plaintiffs were the four infant children of Francis Hamilton, and Isabella, his wife, and the bill was filed on their behalf, by their maternal grandfather and next friend, against their father and mother, and certain other defendants.

The cause was heard on the 18th April, 1836, when it was decreed that the will and codicil of the late Rev. Richard Fisher be declared well proved; and it was referred to Master Goold, to take an account of the real and personal estates of the said Rev. Richard Fisher, and of his debts and legacies.

Master Goold made his report on the 20th November, 1838, and thereby reserved, as a special point for the consideration of the court, whether certain legacies, bequeathed by the testator, were to be payable in British currency, or in the former currency of Ireland.

The facts bearing on the special point were as follows:—

The Rev. Richard Fisher, by his will, dated the 2d October, 1824, (being before the change of currency by 6 G. 4, c. 79,\*) devised and

Will dated before the change of currency, by 6 G. 4, c. 79. A codicil, dated afterwards, was held such a republication of the will, that the legacies were deemed bequeathed in British currency, though the codicil merely appointed new executors.

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\* That act recites, that it is expedient that the currency of Ireland should be assimilated to that of Great Britain, without disturb-

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it is a question of intention on the particular wording of the codicil. the words of the codicil in *Goodtitle v. Meredyth* were: "My codicil to be taken as part of my will."\*

—[The LORD CHANCELLOR asked whether the codicil here was indorsed on the will, or annexed to it? Mr. *Blackburne*—The codicil commences thus—"I, the above-named Richard Fisher."—The LORD CHANCELLOR could not obtain any positive answer to his question, and it did not appear how the fact was.]—

LORD CHANCELLOR.—The question is, whether it shall be necessary to shew, from some words in the codicil, that it was the testator's intention to republish his will, or whether a codicil has that effect, unless a contrary intention can be shewn. If the law is as laid down by Lord Brougham, in *Money Penny v. Bristow*, that determines the question. On the authority of *Guest v. Willasky*, I am bound to say, that, at all events, a codicil indorsed on the will has the effect of republishing it. What Mr. *Warren* relies on is, that there is evidence, from the will itself, that a certain distribution of his property was intended by the testator, and that there is no evidence of any intention to alter that distribution. I do not think that was considered in the cases. The question considered in the cases has been, whether, from the codicil itself, not from the will itself, any intention could be collected. But the question I have to consider is, not whether he intended to alter the distribution of his property, but whether he has, in fact, done an act, the effect of which is to make the whole will as if published at the date of the

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\* See *Frizell v. Blake*, Glascock, 33, where the effect of the 6 G. 4, c. 79, intervening between a will and codicil, was discussed, but the matter left in doubt. It would seem, that until the case of *Acherley v. Lord Vernon*, Com. R. 981, 3 Bro. P. C. 85, the courts rather inclined to hold, that a codicil was not a republication, so as to pass lands purchased in the interval between the will and the codicil, unless the intention to do so appeared on the codicil. Since *Acherley v. Vernon*, a series of cases appear to have established, that the effect of the codicil is to republish the will, so as to pass after purchased lands, unless a contrary in-

tention appears. See Sir William Grant's judgment in *Pigott v. Waller*, 7 Ves. 98. Thus, a rule, introduced for the purpose of aiding the probable intention of the testator, in its application to new cases, entirely displaces the intention. The argument for the legatees, in the above case, would hold equally well, if the act had introduced a new currency of ten or twenty times the value of the old; and it may be asked, whether the construction of the act was not more in question than the effect of the codicil, and whether the legislature intended it to have such an operation on an antecedent will and a subsequent codicil.

codicil. I think the codicil had that effect, and, consequently, that these legacies must be paid in British currency.

*Reg. Lib. fol. 51, Jan. 1839.*

Let the special point be ruled in favor of the plaintiffs, and of the defendant, the Rev. C. R. Carroll, and declare that, under the construction of the will and codicil of testator, the legacy of £5,000 to the younger children of the defendant, Isabella Hamilton, in the pleadings mentioned, and also the annuity of £700 sterling to defendant Mary Carroll, now deceased, formerly Fisher, are payable in British currency, &c.

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Wednesday, February 6th.

PRACTICE—HEARING—DEFECTIVE PARTIES.

PHILLIPPS and others v. PHILLIPPS and others.

In the argument on the hearing of this cause, an objection was taken for want of parties.

The bill sought to raise out of the estate of the defendant Phillipps, a sum of £1,500 charged thereon, by a settlement, dated 3d March, 1794.

Mr. *Pennefather*, Q. C., for the defendant Phillipps, first contended that his estate was not, under the wording of the settlement, liable to the plaintiffs' demand. Being overruled by the court on that point, he submitted that, under the terms of the settlement, and in the events which had taken place, the assets of Dr. M'Dermott, (one of the parties to the settlement of 1794), now deceased, were the fund primarily liable to the plaintiffs' demand, and that the estate of Phillipps was not chargeable, unless his assets proved deficient. Dr. M'Dermott's personal representative should therefore have been a party. It was true, that the defendants, Dalton and wife, were in fact the personal representatives of Dr. M'Dermott. But they were brought before the court in their individual character and not as representatives. Mr. *Pennefather* therefore submitted, that the suit was defective for want of parties.

Mr. *Blake*, Q. C., for the plaintiffs.—It appears by the answer, that the defendants, Dalton and wife, are in fact the personal representatives of Dr. M'Dermott.

Mr. *Monahan* for Dalton and wife.—They cannot be charged in this

Where it appeared at the hearing that the representative of M. deceased, was a necessary party, the court refused to order the cause to stand over, and directed an account of the assets of M., though not prayed in the bill, it appearing that D., a defendant charged in the bill in his individual character only was in fact, M.'s representative.

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suit, otherwise, than in their individual character.—They are not charged in the bill as representing Dr. M'Dermott, and no relief is prayed against his assets. We have not shaped our defence as we would have done, if such relief had been prayed. We have answered in our individual character only. If relief had been prayed against us, as representing Dr. M'Dermott, we would have shown an actual release of the plaintiffs' demand against his assets. And even if the release were out of the way, we have a valid defence on the statute of limitations, to any demand against the assets of Dr. M'Dermott. But being charged only in our individual character, we have not put any of these matters in issue. If the court refers it to the Master to take an account of the assets of Dr. M'Dermott, the Master will proceed to take the account, although we have a clear defence in bar to any such account.

LORD CHANCELLOR.—I am not to dismiss the bill for want of parties, nor do I think it necessary to oblige the plaintiffs to amend their bill. I shall direct an account, but I will frame the decree so that the defendants, Dalton and wife, may be at liberty to rely in the office, on any defence that they might have made at the hearing.\*

\* In *Harvey v. Cooke*, an objection for want of parties, taken at the hearing, was overruled, plaintiff undertaking to give full effect to the rights of the absent parties.—4 Russ. 54. Or, the plaintiff may sometimes waive the relief he seeks against a particular person, when the objection is taken at the hearing, that he is not a party. *Pawlett v. B. of Lincoln*, 2 Atk. 296. A decree of Sir Jos. Jekyll, M. R., dismissing a bill for want of parties, was reversed for that reason, by the House of Lords, and a decree of the Exchequer of the same nature was also reversed, 2 Atk. 15. If the defect is stated in the answer, and the plaintiff, notwithstanding, brings the cause on for hearing, he must pay the costs of the day, if the court thinks it necessary to order the cause to stand over for want of parties: but if the defect be not stated in the answer, it stands over without costs, *Mitchell*

*v. Bailey*, 3 Mad. 61. As to the objection to the frame of the bill, in not praying relief against the assets, it would seem from the case in the text, that the prayer for general relief was sufficient, and see *Wilkinson v. Beal*, 4 Mad. 408; *Hiern v. Mill*, 13 Ves. 114. For the sort of relief which may be granted under the general prayer, see *Jones v. Parishes of Montgomery*, 3 Swans. 208. In *Grimes v. French*, it is said, though you pray general relief by your bill, you may at the bar pray a particular relief that is agreeable to the case made by your bill, but you cannot pray a particular relief, which is entirely different from the case. 2 Atk. 141. It is not easy to collect any principle from the cases, unless it be, that the court will enforce that degree of exactness which will compel the plaintiff to state his case and the objects he has in view, candidly, upon the face of his bill.

*Friday, February 8th, 1839.*

**LUNACY—JURISDICTION—LUNATIC IN ENGLAND—  
LANDS IN IRELAND.**

In re B———, a Lunatic.

This was an application to confirm the report of the Master, appointing a committee of the person and a committee of the estate of the lunatic, and to have a sum applied out of his property for the maintenance of his wife and family.

It appeared that Mr. B. (the lunatic), was possessed of considerable landed property in the county Westmeath, where he had usually resided, but happened to be in England at the period when he became of unsound mind, and was placed by his friends in an asylum of great respectability near Bristol, superintended by Dr. Fox. A commission afterwards issued under the Great Seal of Ireland, and Mr. B. was found and declared a lunatic. He still remained in England, under the care of Dr. Fox.

It was afterwards referred to the Master, in the usual way, to appoint a committee of the lunatic's person and a committee of his estate. The Master made his report, finding that Mrs. B., the wife of the lunatic, would be a proper person to be appointed committee of his person, and that Master Henn was a proper person to be appointed committee of his estate.

A difficulty, however, having been suggested as to the jurisdiction of the Court of Chancery in Ireland, to appoint a committee of the person of a lunatic resident in England, an application was about to be made to the Lord Chancellor of England, when, on inquiry, it was found, that if the Court of Chancery in England appointed a committee of the lunatic's person, it would necessarily be precluded from appointing Mrs. B., who continued at the family residence in Ireland. The lunatic had no property in England.

Mr. *Warren*, Q. C., therefore, now applied to have the report, appointing Mrs. B. and Master Henn confirmed; and stated, that the court having taken the lunatic's property under its control, Mrs. B. had no means of supporting herself and her children, and was now considerably in debt. Under these circumstances, Mr. *Warren* moved to confirm the report; or, if the court had no power to appoint a committee of the person, that some *ad interim* arrangement might be made for applying a portion of the lunatic's rents to the maintenance of Mrs. B. and her family. Mr. *Warren* cited *Newport's case* (a), and submitted, that

Though a lunatic's lands be in Ireland, yet if the lunatic be resident at an asylum in England, the Lord Chancellor of Ireland cannot appoint a committee of his person.

Until a committee of lunatic's person be first appointed, the court will not pay out any sum, even for the present maintenance of lunatic's wife and children.

(a) Shelford on Lunacy, 135.

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all the lunatic's property being situate in Ireland, the court had jurisdiction.

LORD CHANCELLOR.—I have had some correspondence with the Lord Chancellor of England on this subject. There is a perfect equality of jurisdiction between the Courts of Chancery in England and in Ireland. When the lunatic is resident in Ireland, this court appoints a committee of his person; but when the lunatic is resident in England, as in the present case, the Court of Chancery in England is the proper tribunal to appoint the committee of his person.

Mr. Collins, (who was with Mr. Warren, in support of the application.) The lunatic was only accidentally resident in England at the time he became of unsound mind, and was placed in Dr. Fox's establishment, near Bristol. He has no property in England. As regards the present application, for maintenance of the wife and family of the lunatic, there are several cases, where payments have been made to relatives, even distant ones, and not to the committee of the person. *Shelford on Lunacy*, (a). Therefore, the circumstance that there is as yet no committee of the person, need not stand in the way of the application. I would submit, that even under the old statute, 17 Edw. 2, st. 1, c. 10,\* the court has jurisdiction, and it always exercises the right of making *ad interim* arrangements. The property of the lunatic amounts to £1400 a-year. Mrs. B. agreed to pay £300 a-year to Dr. Fox for the maintenance of the lunatic. Dr. Fox is pressing for payment. She is supporting the children, and in debt.

LORD CHANCELLOR.—I can make no order as to paying any thing, until a committee of the person of the lunatic is appointed. The principle on which the court acts, is to see, in the first instance, that the

(a) p. 154. 2 Mer. 100.

\* 17 Ed. 2, st. 1, c. 10.

*The King's prerogative in the preservation of the lands of lunatics.*

"Also, the King shall provide, "when any that before time hath "had his wit and memory, happen "to fail of his wit, as there are many "*per lucida intervalla*, that their "lands and tenements shall be "safely kept without waste and "destruction, and that they and "their household shall live and be "maintained competently with the "profits of the same; and the residue, besides their sustentation,

"shall be kept to their use, to be "delivered unto them when they "come to right mind, so that such "lands and tenements shall be in "no wise aliened; and the King "shall take nothing to his own "use; and if the party die in such "estate, then the residue shall be "distributed for his soul, by advice of the ordinary."—(And, of course, by 31 Ed. 3, c. 11, and the subsequent amendments of the law of administrations, now goes to executors or administrators.)

person of the lunatic is placed in proper hands, and that proper arrangements are made for his personal wants and comforts out of his property. When that is done, if there is any surplus, the court will make orders for such payments to his family as will be proper and expedient; but the committee of the person of the lunatic must be first appointed. In this case, the lunatic is resident in England, and, therefore, I cannot appoint a committee of his person; that can only be done by the Lord Chancellor of England. The circumstance, that the lunatic was only accidentally in England when he became of unsound mind, and was placed in an asylum there, makes no difference in the case. The parties should take the proper steps to have a committee of the person appointed under the order of the Court of Chancery in England. I can make no order.

Application refused.

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## ROLLS.

*Thursday, January 24th.*

PLEADING—DEMURRER WITH ANSWER—NO RELIEF  
IN EQUITY UPON ILLEGAL CONTRACT—SUB-SHERIFF'S LIABILITY UNDER 11 ANNE, c. 8.

FITZGERALD v. ARTHUR.

This court will not enforce nor compel any discovery respecting a contract made in evasion, and contrary to the intent and meaning of statute.

Where the bill stated several distinct matters of agreement, all of which might be described as "partnership" matters, but in the statement, charges, and interrogatories, the bill applied the term "partnership" exclusively to one which embraced several transactions; and the prayer was for an account "of all and every the said several co-partnership transactions, &c., and that the defendant might be decreed to

The bill stated, that the defendant having been Sub-sheriff of the county of Dublin for the year 1810, the plaintiff conducted the business of the office for him, at a salary and certain fees; and that the office of Sheriff being one of considerable risk, the High Sheriff usually requires large security from the Under-sheriff. That the defendant being extensively connected in the county of Dublin, and being also a man in affluent circumstances, and able to indemnify the High Sheriff, has, since the year 1810, usually recommended to the different High Sheriffs of said county, persons to act as their Under-sheriffs, the said defendant becoming security to said High Sheriffs for the Sub-sheriffs recommended by him; and that the defendant having so, from to time, become responsible for the Sub-sheriffs, by an agreement with them respectively, undertook to superintend and conduct the business of the office, *upon the terms of getting the emoluments of the office, and giving to the Sub-sheriff a certain sum out of and in lieu of said profits and emoluments*; he the said defendant acting as the solicitor and attorney of the said Sub-sheriffs, and advising and generally directing them as to the conduct and duties of said office. That in the year 1818, defendant proposed to plaintiff, that in place of a salary and fees, plaintiff should, from thenceforth, have a partnership and share in the profits arising from the management of said office; and it was agreed, that after payment to the Under-sheriffs, of the sum or proportion of the profits which should be agreed to be paid to them, plaintiff should receive one-third of the surplus profits.

That in the year 1819, plaintiff was appointed Sub-sheriff, and a new arrangement was entered into by the defendant with plaintiff, whereby the plaintiff was from thenceforth to have one-half of the profits; and

pay the sum found to be due, &c ;"—the defendant having demurred to so much of the bill as related to the agreement called the *partnership* in the bill, and also to the prayer for an account of "all and every the said co-partnership transactions, &c.," and, as to all the other matters of complaint, fully answered the bill:—*Held*, that the prayer being single, the words "all and every the said co-partnership transactions" must be construed to include all the matters of complaint stated in the bill, and that the demurrer was therefore overruled by the answer; but, as the court would not enforce nor compel any discovery in respect of the contract, called in the bill the *partnership*, the same being against the policy of the law, and the plaintiff being *particeps criminis* it was ordered that the defendant should be at liberty to file another demurrer, confining it to so much of the bill as sought discovery or relief touching that *partnership*; and that the parties should abide their own costs.

that pursuant to this latter arrangement, the business of the office was conducted by plaintiff from thence until 1828, and the profits equally divided. That in 1828 plaintiff was again Sub-sheriff; and that from thence until the year 1831, the business of the office was conducted by the plaintiff, upon the terms of the last mentioned agreement. That although in 1837 the plaintiff became embarrassed by debt, he faithfully accounted with the defendant, for the entire of the monies that came to his hands in said office, but, that from the year 1828, to 1837, the defendant received a large amount of the profits, which he applied to his own use, and never entered in the partnership books. That the plaintiff lately discovered, that defendant had so received the profits unaccounted for; and that from the beginning of the year 1837, notwithstanding the said partnership agreement, the defendant received the entire profits of the office, and paid the plaintiff thereout a sum of £2 a week; and at the end of 1837, declared, that the partnership was at an end. The bill further charged, that if an account was taken from 1828 to 1837, of the profits of the said partnership, a large sum would be found due to the plaintiff.

It farther stated, that the defendant was Clerk of the Peace for the county of Dublin, and entered into certain agreements with plaintiff for his services at the Reform Registration Sessions in 1832, and also, at the Tithe Sessions in 1834, whereby the plaintiff should have one-half of the emoluments arising to the the defendant as Clerk of the Peace at said Sessions, not only from the fees, and from the Government and Grand Jury allowance, but also, from other incidental matters. That plaintiff, accordingly, acted as such Assistant Clerk of the Peace at said Sessions; and that there were certain large profits unaccounted for by the defendant.

The bill further stated some transactions, in relation to costs, in certain causes in which the plaintiff and the defendant acted as solicitors for parties having common interests, and charged, that the defendant received the costs, to which the plaintiff was properly entitled; and stated, that the books and documents relating to the office of Sheriff, *and to the matters aforesaid*, were in the power of the defendant in an Iron Safe, at the office, Upper Ormond Quay, in the custody of defendant's clerk; and that several other books, connected with, and relating to said partnership transactions, were in the house of the defendant, and in his possession and power.

Prayer.—That an account might be taken of all and every the said co-partnership transactions, from the time of the commencement thereof, and also, an account of the said several monies received by the defendant, on foot of costs due and payable to plaintiff; and that the said defendant might be decreed to pay to the plaintiff such sum or sums as should be found due by the said defendant to the said plaintiff, on the

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taking of such account. There was also a distinct prayer as to the costs, and prayer for general relief.

The defendant demurred to so much of this bill, as prayed a discovery of the transactions in relation to the office of Under-sheriff, setting forth "*in hæc verba*" the parts demurred to, including the charge in the bill, "that several *other* books, relating to the said partnership transactions, were in the house of the defendant and in his possession or custody;" also, such part of the prayer, as prayed an account of "all and every the said co-partnership transactions from the commencement thereof, and that the defendant might be decreed to pay to the plaintiff any sum or sums of money in relation thereto."—The causes of demurrer were, 1st, want of equity; 2d, that the discovery sought would subject the defendant to the penalties created by the several acts of parliament relating to the office of Sub-sheriff and Clerk of the Peace.

There was an answer to such parts of the bill as related to the Reform Registration Sessions, and the Tithe Sessions, and the receipt of the various sums by the defendant, for costs due to the plaintiff. It admitted, that the defendant had recommended persons from time to time to act as Sub-sheriffs, and became surety for them; and, that he acted as solicitor and attorney for the said Sub-sheriffs, advising, and generally directing them, as to the conduct and duties of the said office; and that the plaintiff was Sub-sheriff in 1819, and also, in 1828.

Mr. *Monahan*, for the demurrer.—Two causes of demurrer have been assigned: first, the want of equity; second, that the discovery sought would subject the defendant to the penalties mentioned in the several acts of parliament relating to the offices of Sub-sheriff and Clerk of the Peace. The latter cause, I think, it will not be necessary to rely upon; as the discovery and account to which the defendant has demurred are sought in respect of an alleged partnership, contrary to several acts of parliament, or, at least, to the intent and meaning of them; and it has been long settled that a Court of Equity will not establish, nor give any relief under such a contract, *Knowles v. Haughton* (a); *Outley v. Brown* (b); *Ewing v. Osbaldistone* (c). In this case, therefore, the sole question is, Whether or not the partnership transactions, in respect of which the plaintiff seeks discovery and an account, are contrary to the enactments or policy of the statutes?

The 11 *Anne*, c. 8, after reciting the 42 *Edw.* 3, c. 9, which enacts, "that no Sheriff, Under-sheriff, or Sheriff's Clerk, shall continue in office for more than one year;" and the 1 *Ric.* 2; and that by the 23 *Hen.* 6, it is enacted, "that if any Sheriff, Under-sheriff, or Sheriff's clerk, occupy the office of Sheriff, Under-sheriff, or Sheriff's clerk, contrary to "any of the said statutes, or against the effect and intent of them, he

(a) 1 Ves. 168.

(b) 1 Ball &amp; B. 363.

(c) 2 Myl. &amp; Cr. 53.

shall forfeit the sum of £200 yearly, as long as he so occupieth; and that the said acts have been "*notoriously eluded* by Under-sheriffs and "Sheriffs' clerks &c., continuing in the offices for several years together, "one year as Under-sheriff, other as Sheriffs' clerk or deputy, and by "taking the said offices by turns, and in other persons' names in trust, "and receiving the profits for their own use, which hath been the occasion of much corruption," &c.: "for remedy whereof" it is enacted, sec. 2, "that no person whatsoever shall be admitted into, or shall take "on him, or *presume to exercise, execute or officiate, by himself or any "under him, or in trust for him or to his use, the office or duty of Under-sheriff, Sheriff's clerk, or County clerk, who hath within three years, " &c., executed, officiated or exercised either or any of said offices "within the said county," &c., under a penalty of £500.*

The third and fourth sections prescribe the form of oath, and recognizance in the penalty of £200, which the Under-sheriff must take and enter into, "before he shall exercise, or in any manner execute the said office." The condition of the recognizance is in the terms of the oath, which are, that he has "not taken the said office, duty or employment, "to the use of or in trust for any person, who was or hath been Under-sheriff or Sheriff's clerk, or *executed either of the said offices* in the said county, within *three years next preceding, &c.; and that he will execute the same in person*; and that all the perquisites and fees, benefits and advantages, of what nature and kind soever, shall be received to his own proper use, benefit, and advantage, or, to the use of the High Sheriff." The fifth section imposes a penalty of £500, upon any person officiating as Sub-sheriff, before he shall have entered into the recognizance, and taken the oath, just mentioned; and by the 7th section it is enacted, that "no Under-sheriff, or Sheriff's clerk, or *any in trust for him, or to his use, shall execute, exercise, or in any manner act, or officiate, as Clerk of the Peace, for the same county*" under a penalty of £500. This last section is material; as for the years 1832 and 1834, discovery is sought from the defendant, not only as to the partnership in the office of Sub-sheriff of the county of Dublin, but also, as to the emoluments and profits of the office of Clerk of the Peace of the county of Dublin, which, the defendant admits by his answer, he held during these years.

The several amendments which this statute has undergone only extend its provisions, and show the unabated anxiety of the legislature to prevent, by every possible means, such contracts as that which the plaintiff now seeks to enforce. The 12 G. 1, c. 4, prescribes an additional oath to be taken by the Sub-sheriff, before entering office. In the 6th section, it provides for the only case in which the Sub-sheriff may act in the name of another, viz., upon the death of the High She-

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riff; when the Under-sheriff is to act in his name and stead, and may appoint a deputy, until another High Sheriff is sworn. Section 7 imposes a penalty of £500, upon the buying, selling, or farming any of the offices connected with the shrievalty; and section 8 provides for the case of the Under-sheriff, while acting upon the death of the High Sheriff, in his stead.

The 3 *G. 2*, c. 9, recites the 11th of *Anne*, c. 8, and imposes the like penalty upon the Sub-sheriff acting in trust for any one known to have officiated within three years in the same county, as the 11th of *Anne* imposes upon the person for whom the trust is created; and renders the High Sheriff knowingly appointing such person as Under-sheriff, liable to the like penalty.

The 29th *G. 2*, c. 15, s. 1, recites the 11th of *Anne*, c. 8, and the different methods by which that statute had been *evaded*, in consequence of its being lawful for the same person to be again appointed to the office of Sub-sheriff in the same county, in three years after his former year of office, and accordingly varies the 11th of *Anne*, c. 8, by making the term of disability *ten* years, instead of three.

So the law stood until the month of November, 1835, when the 5th and 6th *W. 4*, c. 55, came into operation. This late act so far repeals the former acts, that a Sub-sheriff may now continue two or more years consecutively, in office.—[MASTER OF THE ROLLS. The clause to that effect was not in the bill as originally framed; but was introduced, I suppose, in consequence of the suggestion of some person in the interest of the Sub-sheriffs, upon the second reading of the bill in the House of Lords.]—However, it does not remit the penalties previously incurred; nor make it lawful for a Sub-sheriff to act by deputy, or to hold the office in trust for another, or by or in the name of another. An offender, in any of these respects, is still liable to the old penalties; and before officiating, the Sub-sheriff must still enter into recognizance, and swear as required by the 11th of *Anne*, that he will execute the office in person, and not by deputy, (except in case of the death of the High Sheriff, provided for by the 12th *G. 1*, c. 4); “and that all the “fees and perquisites, benefits and advantages of what nature or kind “soever belonging to the said office, shall be taken to his own use, benefit, and advantage, or, to the use of the High Sheriff.”

The partnership, respecting which the discovery is sought, is stated in the bill to have been entered into by the plaintiff and defendant, in the year 1818, and to have continued from that time uninterruptedly until the latter end of 1837. An account is prayed on foot of this partnership from its commencement. It further appears, that the defendant held the office of Sub-sheriff of the county of Dublin, for the year 1810, and that the plaintiff, in partnership with the defendant,

held the same office within ten years, viz., in 1819, in contravention to the 29th *G. 2*, and incurring its penalties; and that the same partnership again incurred the like penalties in the year 1828, when the plaintiff, for the second time, nominally filled the office of Sub-sheriff.—[MASTER OF THE ROLLS. Is not the time, within which the action for penalties, under these statutes, must be brought, limited to two years from the period of the offence?]\*—Yes; but I am not now seeking to sustain the demurrer upon the defendant's liability to penalties, which I mention only as illustrating the utter illegality of the contract here sought to be enforced.—[MASTER OF THE ROLLS. As respects the discovery sought and the account prayed for in the other years of the

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\* As this very important question is not again adverted to by the court, it being unnecessary to consider the second cause of demurrer, when the first was allowed, the Editor takes leave to refer to a late and express decision upon the subject:—

In *Barrett q. t. v. Johnstone*, (Exchequer, Michaelmas, 1836,) it was held, that no action for penalties, upon the 11th *Anne*, c. 8, can be maintained *after one year* from the time of the offence. The case is not reported; however, it was a *qui tam* action for penalties upon the 11th of *Anne*, c. 8, against the defendant, who had been Sub-sheriff of the same county for two or more years successively, contrary to the provisions of the statute. The defendant pleaded in bar the 28 *Hen. 8*, c. 21, i. e. *actio non*, the offence not having been committed *within one year*. The plaintiff demurred to this plea, and so the question came before the court. The law was then very fully and ably discussed, and every point vigorously contested, on the one side, by Mr. *Pigot* (the present Solicitor-General), who had taken the demurrer, and on the other by Mr. *Sproule*, who had drawn the plea. Afterwards, the late Chief Baron *Joy*, for himself and brethren, *nem. dissent.* pronounced a luminous judgment in the case,

overruling the demurrer, and holding, that the 28 *Hen. 8*, c. 21, is clearly a bar to an action for penalties upon the 11th of *Anne*, c. 8, unless brought within one year from the time of the offence.—Unless the Editor's memory fails him, Sir *Michael O'Loughlen* sat as Baron of the Exchequer during the argument in this case, but had taken his seat, as Master of the Rolls, before the judgment was pronounced.

Thus, it is plain that the second cause of demurrer, above assigned, could not be maintained; though, for any thing stated in the argument no answer has been given to it; for there can be no doubt that the 2 *G. 1*, c. 20, does not apply to actions for penalties upon the 11th *Anne*. Lest, however, what is said by the counsel *arguendo* should produce misapprehension upon the subject, it is right to observe, that the seeming acquiescence of the opposed counsel may be accounted for, by considering that it was of little or no importance to the argument for the plaintiff, which of the two statutes should be admitted as a bar; and the 2 *G. 1* may have been adopted, as the question put by the Master of the Rolls may have appeared to suggest it. On the other hand, the limitation of penal actions was altogether irrelevant to the view of the case presented

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partnership, must you not argue that no Sub-sheriff shall have a clerk ?] We admit that a Sub-sheriff may have a clerk ; but the question arising in this case is different. According to the statement in the bill, the defendant being an *affluent* man acquired the nomination of the several Sub-sheriffs, by becoming security for them. This security was given upon the terms, not indeed, that the defendant should be appointed as their clerk, at a certain salary or allowance for his services, but of get-

by the defendant's counsel, and they may have acquiesced in the plaintiff's argument as to the 2 G. 1, as he thereby admitted, that when the bill was filed, the defendant was liable for *two years'* penalties, though according to *Barrett v. Johnstone*, he could not be liable for more than *one*. But in whatever way this seeming concurrence of the counsel on opposite sides is to be accounted for, it will be proper, as the question is one of much nicety and considerable importance, to state shortly the reasons why the 2 G. 1, c. 20, does not apply to penal actions upon the 11th of *Anne*, and the grounds upon which the court of Exchequer has decided that the 28 *Hen.* 8, c. 21, is a bar to such actions, unless brought *within one year* from the time of the offence.

The penalties created by the 11th *Anne*, c. 8, and the subsequent amendments, 3 G. 2, c. 9, and 29 G. 2, c. 15, are "to be recovered," as declared in the 2nd section of the 11th *Anne*, c. 8, "in any of her Majesty's Four Courts of Dublin,"—"the one moiety thereof to be applied to the use of the workhouse or house of correction of such county or county of a city wherein such offence shall be committed; the other moiety to be applied to the use of him, her, or them that will sue for the same in any of her Majesty's Four Courts of Dublin, by action of debt," &c.

The 2 G. 1, c. 20, s. 3, provides only for two classes of cases:—1st, where the proceeding is "for any

"forfeiture upon any statute penal, made or to be made, *whereby the forfeiture is or shall be limited to the King*, his heirs or successors *only*;" 2nd, where, &c., "for any forfeiture upon any penal statute made or to be made, *the benefit and suit whereof is or shall be by the said statute limited to the King*, his heirs or successors, and to any other which shall prosecute in *that behalf*." The forfeiture created by the 11th *Anne*, c. 8, is not limited, either wholly or in part, to the King, and therefore does not come within either of the classes of cases provided for by the 2 G. 1, c. 20.

Upon the construction of the English act, 31 *Eliz.*, c. 5, analogous to the 2 G. 1, *fr.*, and in terms providing for the two cases, 1st, where the penalty is limited to the King only; or, 2dly, *to the King and the informer*; this latter clause has been construed to include penalties limited "to the *the poor of the parish* and the informer." But this construction is confessedly strained to include a case otherwise unprovided for, there being no doubt that it was not the intention of the legislature to omit it. The reason is stated to be (see 1 Tidd P. p. 14, 15, citing the case of *Lookup v. Sir T. Frederic*) that the action for penalties limited "to the poor of the parish and the informer" was within the 7th *Hen.* 8, c. 3, which was repealed by the 31st *Eliz.* c. 5; and that this latter statute was made to narrow the time given by the former, and could never

ting the control and emoluments of the office ; and of giving to the several Sub-sheriffs "a certain sum out of and in lieu of the said profits

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have been intended to limit the action *where the King was concerned*, but to leave the action when given to the *informer alone*, unrestrained. Cogent as this reasoning undoubtedly is, as respects the 31st *Eliz. Eng.*, it is wholly inapplicable to the 2 *G. 1, Ir.*, which is *cumulative*, leaving the previous Irish act, 28 *Hen. 8, c. 21*, providing for the same cases as were provided for by the 7 *Hen. 8, c. 3, Eng.*, unrepealed. Therefore as neither the necessity nor the reason for the forced construction of the English act applies to the 2 *G. 1, Ir.*, it is to be construed literally, and does not extend to actions for penalties limited, as in this case, to a charity and the prosecutor.

It will be borne in mind, that the reason given for the peculiar construction of the English act, assumes that the statute, thereby repealed, provided for the case of penalties limited to a charity and the prosecutor. Now, the 28 *Hen. 8, c. 21, Ir.*, is a transcript in all material respects of the repealed English act which does not appear in the ordinary editions of the statutes, but may be found at large in the fine edition printed by command of *G. 3*.—The cases provided for by the Irish act are three: the first and second are the same as those mentioned in the 2 *G. 1, Ir.*, and 31 *Eliz. Eng.*, as to which, those statutes still further limit the time of bringing the action. But the third case of limitation peculiar to 28 *Hen. 8 Ir.*, is where the statute penal gives the action &c., to the prosecutor alone, and it is "*onely for him or themselves, that such action, bill, suit, or information bee commensed.*"

In *Barrett q. t. v. Johnstone*, before mentioned, the Court of

Exchequer held, in conformity with the English decisions, that this third clause of 28 *Hen. 8, c. 21*, extends to actions for penalties upon the 11 *Anne c. 8*.

For the demurrer, it was argued that, the clause does not apply: as, one moiety of the penalty goes to the workhouse, and only the other moiety goes to the informer; and therefore the action must be by the informer, or informers *qui tam*, and cannot be commenced "*onely for him or themselves.*" But the court adopted the argument for the plea, and held that it never was intended to leave this action unlimited in point of time. That this is not properly an action *qui tam*: for there are but three kinds of action upon the statute: 1st, at the suit of the King only, viz., by indictment, or information. 2d, at the suit of the party *qui tam pro domino rege quam pro seipso sequitur*. 3d., at the suit of the party alone. Com. Dig. *action upon the statute, E. 1*. That this is not necessarily an action *qui tam*: for, a charity cannot sue, and the action would be well brought by the informer in his own name, without *qui tam*, and the penalty would be severed in the judgment. *Dickenson v. Clare*, 2 Kebl. 820, pl. 30. Viner ab. *action qui tam*. A. 4, pl. 10; *Balchin v. Clarke*, Barnes 471; *Rez v. Lovet*, 7 T. R. 152. That accordingly, this is to be considered as properly an action by the informer alone; and therefore barred by the 28 *Hen.*, 8, unless brought within one year from the time of the offence.

The Editor regrets that it is not in his power to give a full note of the judgment in *Barrett, q. t., v. Johnstone*, but he has no doubt that he has correctly stated its principal points.



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"and emoluments." Thus, the partnership subsisted; and while it lasted, the plaintiff and defendant must be considered as having virtually held the office of Sub-sheriff between them. The nominal Sub-sheriffs being merely their creatures, whose nomination was procured only as the means of evading the law. We therefore submit, that this partnership was, if not a direct violation, at least, a very gross *evasion* of the law, and repugnant to its intent and meaning; so that a Court of Equity could not sanction, nor compel any discovery in respect of such a contract. As already stated, it is not sought to rest this demurrer upon defendant's liability to penalties; though, according to the allegation in the bill, it is plain that when the bill was filed the defendant was liable to penalties; and also, was under the still more serious liability of being a party to each of the Sub-sheriffs' taking a false oath: for, how could the Sub-sheriff, under such an agreement with the defendant as that stated in the bill, take the oath prescribed by the 11th of *Anne*? We therefore submit that this demurrer must be allowed.

Messrs. *J. D. Fitzgerald* and *Fitzgibbon*, in support of the bill.—This demurrer is bad in substance, and informal. It does not appear in the bill, nor could it appear by any discovery sought by the bill, that the office of Sub-sheriff of the county of Dublin was ever held *in trust*, for or by the defendant. He was Sub-sheriff once, and but once, so long ago as the year 1810. It is not stated, nor could it appear by the discovery sought, that since the defendant has been Clerk of the Peace of the county of Dublin, he ever was, by himself, or in the name of another, Sub-sheriff of the county of Dublin. Therefore, he cannot resist the discovery and account, upon the ground that they would render him liable to penalties. But if, upon a wider construction than would be allowable of statutes so highly penal, it should appear that the defendant, by his agreement with the Sub-sheriffs, incurred penalties under the 11th of *Anne*, c. 8, and the other statutes following out the intention of that act, yet, all liabilities in respect of such penalties were extinguished by the 2 *G.* 1, c. 20, s. 3,\* after two years from the time of the offence. Therefore, the demurrer relying on the penalties should have been confined to the discovery and account of the partnership transactions, within the last two years; and as it is not, it must be overruled. *Talbot v. Smith* (a); *Southall v.* — (b). It is also to be observed, that the defendant's agreement with the Sub-sheriffs is expressly charged to have been made after they had taken the oath of office. He, therefore, did not incur any liability by the oath.

(a) 1r. T. R. 367.

(b) 1 Young, 316.

\* See note *ante* p. 189.

We contend that the defendant's agreement with the Sub-sheriffs, in fact, amounted to no more than that the defendant, having become their surety, should superintend the general business of the office, as their solicitor, attorney, and general adviser; and that, in return for his services, he should receive a certain proportion of the emoluments. He was not himself to fill the office of Sub-sheriff, either nominally or virtually; he was merely the conducting clerk. It is admitted on the other side, that a Sub-sheriff may have a clerk; and it must also be admitted, that he may pay the clerk out of the emoluments of the office. Part of the arrangement, it is true, was, that the defendant should receive the emoluments, and pay a certain sum out of the profits to the Sub-sheriff. But in such an office as that of the Sub-sheriff, where the chief emolument is made up of small sums constantly dropping in, there could not be any arrangement more natural or convenient.

But, as already observed, this demurrer is informal: it is too large, and is overruled by the answer. The bill charges, "that the defendant has in his house, in his possession or custody, certain other books relating to the *matters aforesaid*." To this the defendant has demurred. The "*matters aforesaid*" must obviously mean, *the several matters before stated*, as to some of which the defendant has answered. Again: three classes of partnership transactions are stated in the bill: first, as to the Sheriff's office; second, as to the office of Clerk of the Peace at the Registry Sessions in 1832; and third, as to the office of Clerk of the Peace at the Tithe Sessions in 1834. There is no distinct prayer as to each of the classes of transactions; but the bill prays, "that an account may be taken of all and every the said co-partnership transactions;" and to this the defendant has demurred, although he has answered, and does not pretend to refuse any discovery or account, in relation to any of the said co-partnership transactions, except that relating to the office of Sub-sheriff. This demurrer, therefore, must be overruled. *Wynne v. Jackson (a)*.

Mr. Miller, Q. C., in reply.—It is not stated in the bill, that there was any partnership of the office of Clerk of the Peace for the Registry Sessions or Tithe Sessions; on the contrary, what is stated appears to negative every idea of such a partnership.—[MASTER OF THE ROLLS. Is there not stated an agreement, that all the profits of the Clerk of the Peace, at those Sessions, were to be divided equally between the plaintiff and defendant, in consideration of the plaintiff's services? ]—Yes: the defendant being Clerk of the Peace during the pressure of public business at those sessions, gave to the defendant a temporary employment as his clerk or assistant, and when

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(a) 1 M'Clell. & Young, 55.

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he had no further occasion for his services, discontinued them. This was not a partnership : and it is to be observed, that the terms, "partnership," and "partnership transactions," are, in the statement, charges, and interrogatories of the bill, applied exclusively to the transactions relating to the Sub-sheriff's office, of which several are stated. Consequently, the meaning of "all and every the said co-partnership transactions," in the prayer, is fully satisfied, though limited to the transactions relating to the Sub-sheriff's office.—[MASTER OF THE ROLLS. The difficulty which presses my mind is this :—The agreements respecting the Registry and Tithe Sessions, though they may not be designated "partnership transactions" in the body of the bill, might very well come in under that description in the prayer. If I should hold, that "all and every the said co-partnership transactions" refer, in the prayer, exclusively to the matters relating to the Sheriff's office, then, the bill will contain no prayer as to the matters complained of respecting the Registry and Tithe Sessions. Similar objections to those made to the form of this demurrer I have observed, in almost every case where the demurrer was coupled with an answer. No doubt, there may be a demurrer with an answer ; but I have rarely, if ever, known the experiment to succeed, in consequence of the extreme difficulty of keeping the two distinct at all points.]—It is really impossible to read the bill through, without being convinced that there is an accidental omission in the prayer ; and this additional defect in the bill ought not to prejudice the demurrer. But, upon this point, it is submitted that the words "co partnership transactions," in the prayer, should be construed to mean what the same and similar words indisputably mean in the body of the bill, and that they should accordingly be confined to the transactions relating to the Sub-sheriff's office.

As the objection respecting the defendant's liability to penalties is not pressed, and the first cause of demurrer is that relied upon, there was no reason for confining the demurrer in the manner suggested upon the other side.—[After shortly restating the general argument for the demurrer, counsel submitted that this demurrer must be allowed.]

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*Curia adv. vult.*

The MASTER OF THE ROLLS, after stating the contents and prayer of the bill, and having distinguished the parts respectively answered and demurred to, delivered the following judgment :—

Two causes of of demurrer are assigned on the record, but one only, the want of equity, has been insisted on. This rests upon the alleged illegality of the contract sought to be enforced, which is said to contravene several acts of parliament relating to the offices of Sub-sheriff and Clerk of the Peace ; and, therefore, such as a court of Equity would not enforce.

It is stated in the bill, that the defendant, being an affluent man, and

having influence with the High Sheriffs, usually recommended persons for the office of Sub-sheriff. It is further stated, that during the several successive years for which, at the defendant's instance, persons were nominally appointed to the office of Sub-sheriffs of Dublin, the defendant was to direct and generally manage the business of the office, and have its profits and emoluments, and be the person liable to the several High Sheriffs for any default or miscarriage. It is therefore plain, that the defendant was, *in fact*, the Sub-sheriff for these several successive years, in contravention to the 11th of *Anne*, c. 8; and, consequently, that the partnership contract growing out of, and based upon this illegal proceeding, is one upon which this court will not compel any discovery, nor give any relief.

The 11th of *Anne*, c. 8, s. 1, after reciting the previous statutes, enacting, in substance, that no person shall, directly or indirectly, continue in the office of Sub-sheriff for more than one year in the same county, and the various means by which the said acts had been "notoriously eluded," and the consequent mischiefs, enacts "for remedy thereof, and "for the better and more effectual execution of such wholesome and necessary laws"—"that all and every of the laws and statutes (then) in force, for or touching the office of Under-sheriff, and not (thereby) altered or repealed, shall be duly put in execution according to the tenor of the said laws, and under the penalties therein contained." The tenor of those laws and statutes evidently runs against any plan or contrivance whatever, by which a person shall hold the office of Sub-sheriff for or in the name of another, or continue, directly or indirectly, as Sub-sheriff of the same county for more than one year.

It is needless to go through the very numerous class of cases, shewing that a court of equity will not enforce or give any relief upon an illegal contract; and that it will look beyond an evasive agreement to the real contract of the parties. I shall, however, mention two cases, which, like the present, arose out of breaches of statutory enactments.—The first is *Armstrong v. Armstrong*, and *Lewis v. Armstrong*, (being cause and cross-cause (a). In that case, an instrument was executed, purporting to be a deed of partnership, its real object being to protect an usurious contract, and secure the loan of money at 10 per cent. No illegal stipulation appeared upon the face of the instrument, whereby one Armstrong, who was a pawnbroker, agreed with one Warner, that, in consideration of the sum of £2,000 advanced by the latter, they should carry on the trade of pawnbrokers, in partnership, for the term of fourteen years, determinable by either party, on giving one year's notice to the other; and that, on the determination of the partnership, Warner should draw his £2,000 out of the concern, and in the mean

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(a) 3 Myl. & Kee. 45.

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time receive £50 every three months, *as his share of the profits*. Thus the 10 per cent was regularly paid for several years; but Warner never interfered, and the business was carried on, and the pawnbroker's licence taken out by and in the name of Armstrong only; nor was any claim of partnership set up, until after the death of Armstrong, when his children having filed a bill for an account of his assets, making Warner a party, Warner filed a cross bill, claiming to be entitled as partner under the deed already mentioned. The sole question in the cause was, Whether or not the contract was *bond fide*—Whether it was really the intention of the parties, that Warner should be legally and actually the partner of Armstrong in the pawnbroking business; the non-publication of the partnership, as required by the statute regulating the office and duties of pawnbrokers, being accidental, and merely subjecting Warner to penalties; or, was it fraudulent in its inception, and intended either to establish a *secret* partnership, contrary to the statute, or not intended to establish a partnership at all, but merely to screen and secure an usurious transaction?

The Master of the Rolls, looking behind the deed, at the conduct of the parties, was of opinion that the claim now set up was not *bond fide*, and dismissed the cross-bill with costs. The case being then brought upon appeal, before the Lord Chancellor Brougham, the Master of the Rolls' decree was affirmed. In his Lordship's judgment in the case, after stating the transactions between the parties, he says, p. 66:—"The question is, whether or not any man of plain and ordinary understanding can hesitate a moment how he shall explain all this, and to what contract, if partnership there be in the matter, all this acting shall be referred? There were times when courts of justice took a delight in vain subtleties and absurd refinements, as if their duty ever was, what certainly was their frequent object, rather to shew their ingenuity than to get at the truth, and to astonish ordinary minds by coming at unexpected conclusions, founded on bare possibilities; rather than satisfy the justice of the case, by deciding as all mankind besides would decide undoubtedly. Those were the times when the most ordinary actions of men were wrested to humour inferences hardly rational, though not absolutely impossible, and when the words of men were tortured and made to bear the meaning most remote from the real truth. Happily, we have outlived those follies, the pride of the older times, and the remains of the dark scholastic ages. Judges are now content to see things as ordinary men do, and when facts come before them, to draw from them the inferences as to conduct which a jury would clearly deduce. To the facts in this case I cannot shut my eyes, nor can I avoid the conclusions to which I know as certainly that any jury must come, to whom they might be submitted by an

"issue, as I know that I sit here. A secret understanding, amounting "to a collateral agreement, subsisted between the parties, in execution 'of which it was that Warner was, if a partner at all, a dormant or "secret, nay, a partner concealed and not merely dormant; carefully, "designedly, craftily concealed, breaking the statutory provisions, not "so much by *non feasant* or mere omission, as by a course of cunning "contrivance. The existence of both agreements, the open and the "secret, is clear, and they were parts of one contract wholly illegal."

In this eloquent language there is sound sense: it truly states the duty of a court of Equity; and, in its exposure of the artifice by which the law was to be set at nought, might nearly be applied to the contrivance in this case, but that here, there is scarcely a form or semblance of propriety to raise a question as to the intention of the parties.

The other case which I shall mention is *Harmer v. Westmacott* (a). There, one Richards, being the proprietor of a newspaper, prevailed on one Bowden, who was a journeyman printer on the establishment, to make and deliver to the Stamp Office, an affidavit that he was the proprietor of the paper, in contravention to the 38 G. 3 c. 78. Afterwards Bowden, with privity of Richards, agreed to sell one moiety of the paper to Westmacott, and subsequently without any authority from Richards, agreed to sell to the same person the other moiety also. Richards having become insolvent, his assignee filed a bill to set aside the sale, on the ground that, as to the first moiety, it was fraudulent and for inadequate consideration; and as to the other, void, Bowden having no interest in the paper, nor any authority from Richards. This bill was dismissed with costs: and it is to be observed that the plaintiff in this case was the assignee, not of the person who made the affidavit in violation of the statute, but of a party privy, at whose instance that violation was committed. The Vice Chancellor thus concludes his judgment in the case: "No relief can be given, in a court of justice, to those who shew that "they thought proper to disappoint *the policy of the law*, and to do that "which the policy of the law requires should not be done."

I might multiply cases to the same effect, but the two just mentioned are sufficient to shew that the plaintiff in this case cannot have any discovery or relief respecting the partnership of the Sub-sheriff's office—an agreement so repugnant to both the letter and the spirit of the law, so mischievous, directly by its effects, and indirectly by its example, and so prejudicial to a wholesome state of society, that for the sake of the law, and of public morals, it is the duty of a court of Equity not to favor or relieve, but to censure and discourage it.

But while the cause of demurrer is clearly sufficient in substance, a difficulty arises from the form of it. It covers too much; it extends to the prayer for an account of "all and every the said co-partnership trans-

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v.  
ARTHUR.

(a) 6 Sim. 254.

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"actions," which the court must construe to include all the matters of complaint which would admit of such description, and for which, if not so included, there would be no prayer. But as to several of those transactions, the defendant has fully answered, and does not pretend that an account should be refused. What then is the court to do between the justice of the case, and the technical objection?

In ordinary cases, as in *Devonsher v. Newenham* (a), when the demurrer is overruled for informality, but good in substance, the rule is, that the demurrer is overruled *pro forma*, and that the defendant shall be at liberty to take it off the file, and demur again, as he shall be advised, on payment of costs.\* But here, as the discovery and relief sought and demurred to involve matters of a criminal nature, and the plaintiff is *particeps criminis*, he must bear his own costs, according to the rule in *Debenham v. Ox* (b). I shall therefore say,—

Order.—Overrule the demurrer, and let the defendant be at liberty to file another demurrer, confining it to so much of the plaintiff's bill as seeks any discovery or relief touching the partnership transactions in the bill mentioned, or relating to the profits of the office of Sub-sheriff of the county of Dublin; and let the parties abide their own costs.

(a) 2 Sch. &amp; Lef. 199.

(b) 1 Ves. Sen. 275.

\* See *Daly v. Kirwan*, ante 156.

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Thursday, January 17th.

#### PRACTICE—APPLICATION, BY PLAINTIFF, FOR LEAVE TO EXAMINE ONE OF THE DEFENDANTS.

BLAKE v. BLAKE and others.

The plaintiff's application for leave to examine one of the defendants as a witness, though almost of course, must be on notice. The plaintiff in such case takes the order subject to all just exceptions at the hearing, as to the competency of the witness.

Mr. LYONS, for the plaintiff, moved that he should be at liberty to examine one of the defendants as a witness; the usual side-bar rule, for the examination of one of the defendants, being applicable only as between co-defendants.

The MASTER OF THE ROLLS asked if notice had been given; and said, that although this motion is almost as of course, yet, it was one of that class, the nature of which suggested the possibility of objection on

the other side, and in which therefore, the court requires notice to be given that the parties may have the opportunity of objecting.

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BLAKE  
v.  
BLAKE.

Wednesday, January 23d.

Accordingly, the motion having been renewed on notice :—

Mr. *Crawford*, for the defendants, submitted, that if the plaintiff's motion should be granted, he should be put under terms of going to hearing without joining issue with the defendant to be examined; *Winter v. Kent (a)*; but,

The MASTER OF THE ROLLS refused to put the plaintiff under terms; but said that he must take the order, subject to any objection which might be made to the competency of the witness at the hearing, and to all just exceptions.

(a) *Dickens*, 595.

Friday, January 25th.

PRACTICE—COUNSEL'S CERTIFICATE TO EXCEPTIONS—  
72D NEW RULE—O'KEEFFE'S ORDER,  
(10TH JULY, 1789.)

ADAMSON v. JAMESON and others.

Mr. RICHARD COTTON WALKER moved that the Master in this cause might proceed to make his report as to the exceptions taken by the defendants' answer, notwithstanding the objection taken to the certificate of counsel, at foot of the said exception.

The certificate was in the words of the 72d rule, (November, 1834,) "that the exceptions were proper and necessary," &c.; but omitted to state that the counsel had "read the bill and answer, and had read and approved of the exceptions," as required by the old rule, (10th July, 1789, O'Keeffe.) For this omission, counsel objected to the exceptions in the office; and the Master, having allowed the objection, declined to entertain the exceptions. It was now insisted, that the certificate under the 72d New Rule was quite sufficient.

Mr. *Fitzgibbon*, *contra*, said that the New Rule does not avoid the obligation of the old one; and it was but reasonable, that counsel should certify he had read the pleadings, before he gave the certificate as to the exceptions.

At the foot of exceptions taken to an answer, the certificate of counsel need only state that "the exceptions are proper and necessary, and not taken or served for delay," according to the 72d order, (Nov. 1834,) and need not state "that he has read the bill and answer, and has read and approved of the exceptions," according to the old rule, (10th July, 1789, O'Keeffe.)



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JAMESON.

MASTER OF THE ROLLS.—The certificate in this case is quite sufficient. It cannot be supposed that any gentleman would certify that an answer was short or insufficient, without having read the pleadings. You had therefore better proceed to argue the exceptions before the Master.

Wednesday, January 30th.

## PRACTICE—NOTICE OF MOTION.

CURREEN v. WALSH and others.

A notice of motion should fully state the matter of the application, so that if the court should say "Be it so," the officer may be enabled, by following the notice, to frame the order.

Where the notice of motion was for leave "to amend the bill in the several particulars specified in an

The notice of motion in this case was for leave "to amend the bill in the several particulars specified in the affidavit of A. B., this day filed, &c., without prejudice to the injunction," &c.

The MASTER OF THE ROLLS said he would not make any order upon the motion, as the notice was defective, in not specifying the amendments sought. Reference to an affidavit for the particulars of the application is insufficient. The notice should fully state what the party is about to apply for, so that, upon reading it, the court may know exactly what is desired; and that if, after hearing the counsel, the court should say, "Be it so," the Officer may be enabled, by following the notice, to frame the order.

No rule.\*

the court refused to make any order.

\* See *Gordon v. Breaker*, 6 Law Rec. N. S. 267.

Friday, February, 1st.

## INJUNCTION TO STAY WASTE

Sir WM. A. CHATTERTON, Bart., v. WHITE and others.

A demise of  
"land, with  
"the bog and  
"mountain  
"thereunto

"adjoining," does not confer upon the lessees a right to cut turf for sale.

Where an ancient lease (upon which a question arises as to the power to cut turf for sale) is lost, the recitals of the terms of the demise in a renewal will be taken as evidence of the terms of the demise, even against an alleged user of the right.

If user is relied upon it must be shewn to have been uninterrupted, as against the landlord.

Costs of proceedings for an injunction, in the nature of a writ of estrepement, which does not pray an account or answer, are seldom, if ever, given to the landlord.

In this case a conditional order had been obtained upon a previous day, for an injunction in the nature of a writ of estrepement, to restrain

the defendant White, and the other defendants who were his undertenants, from cutting turf for sale upon the lands of Toureen, in the county of Cork. The order had been made absolute against all the undertenants, White, the immediate tenant, alone shewing cause.

The bill upon which the order had been obtained (and which did not pray an account or answer), was verified by affidavit, and stated a lease of the lands in question in the year 1775, to the ancestor of the defendant, for three lives, with a covenant for renewal; a subsequent conveyance of the reversion in fee to the ancestor of the plaintiff, and renewal of the above lease (dated 2d October, 1800), from the ancestor of the plaintiff to the ancestor of the defendant. In this lease, under which the defendant now claimed, the granting words were, "*the lands of Toureen, in as large and ample a manner as they were formerly held and enjoyed by B., and his undertenants, with all the easements, appurtenances, &c., thereunto belonging.*" There was no mention of bog or mountain in the lease of 1800, and it contained a covenant to uphold and keep the demised premises. The bill further stated, a bill filed in the year 1813 to stay waste on those lands, and an absolute injunction order obtained thereon. It then stated the cutting of large quantities of turf for sale, and prayed an injunction to restrain defendants, undertenants and laborers, from cutting turf upon the said lands, for any other purpose than the necessary consumption of the tenants in their houses upon the premises.

After the conditional order was obtained, leave was granted to the parties on both sides, to file supplemental affidavits (a), the material statements in which were, that defendant White had never been served with the conditional order for injunction in 1813, although named therein. But, to this it was answered, that the lands were then in his possession; and that an attachment had been executed against one of the tenants in occupation, for disobedience to the injunction.

Mr. Keatinge, Q. C., shewed cause for defendant White.—The lease of 1775 is not forthcoming on either side. The defendant in his affidavit states, he believes the terms of the demise thereby were "of the lands of Toureen, with the bog and mountain thereunto adjoining, containing several hundred acres." This statement is uncontradicted on the other side, although the opportunity was given for answering it, if untrue; and they have answered as to other points. We also swear, upon belief, that the right to cut turf was always exercised, and with the privity of the landlord, during the continuance of the old lease. It must therefore be taken, that our uncontradicted statement of the terms of the demise, accompanied by the assertion of the right, is a true statement of the terms of the lease of 1775, which, therefore, being a demise

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TON.  
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WHITE.

(a) See *Newenham v. Cahill and others*, 6 Law. Rec. N. S. 373.

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WHITE.

of bog, *qua* bog, conferred a right of cutting turf for sale. In 1800, a new lease (the subject of the present suit) was made, and the lands, &c., were thereby demised "in as large and ample a manner as they had formerly been held and enjoyed by B., &c." These words continue the right under the old lease, to the lessees of the lease of 1800; and even if that lease was silent on the subject, this case is similar to that of an open mine, and the right would continue.

Mr. Brooke, Q. C., and Mr. Berkeley, *contra*.—The lease of 1775 is not in existence, but no intendment is to be made against the landlord, on that account, as it should properly be in the custody of the defendant. In its absence, the best evidence of its contents must be the lease of 1800, which professes to recite the old lease fully, and states the old demise precisely in the words of the new, without any mention of bog or mountain. But, even admitting the words to have been as stated by the defendant, they would not confer a right to cut turf for sale, unless the land demised was valuable only as bog, and this is directly contradicted by the affidavits. Then as the lease of 1775 did not confer a right to cut turf for sale, the *user* during the existence of that lease could not have established it: for the tortious acts of a tenant will not oust the landlord. It is therefore plain that no such right exists; as the lease of 1800 neither created nor continued it.

MASTER OF THE ROLLS.—In the absence of the old lease, the recitals of it in the new are the best evidence of its contents. But I would not hold that a demise "of land, with the bog and mountain thereunto adjoining," conferred a right upon the lessees to cut turf for sale.

Mr. Keatinge, in reply, relied upon *user* from 1775, without interruption as regarded White, who had never been served with the previous injunction.—[MASTER OF THE ROLLS. If *user* is relied upon at all, it must be shown to have been uninterrupted. Here, although White was not a party, there was a regular judicial proceeding in this court, upon the same subject matter, and grounded upon the same documents within twenty-five years, with an adjudication in the landlord's favor.]—The defendant states in his affidavit, that the plaintiff bought up the interest of one of his under-tenants for the purpose of obtaining "a footing on the bog" and cutting turf for sale.

MASTER OF THE ROLLS.—Such a dealing could not prejudice the plaintiff's right as a landlord to this injunction.

Conditional order made absolute.

Mr. Brooke applied for the costs.

MASTER OF THE ROLLS.—In injunctions of this nature, costs are

seldom or ever given. The proceeding is very favorable to the landlord, who obtains a perpetual injunction by a very summary process, and at small delay and expense. It has therefore always been considered, that a landlord, coming into court for an order of the description here prayed, must abide his own costs.

No costs.

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TON  
v.  
WHITE.

Monday, February 4th.

**COSTS—SOLICITOR OF DEFAULTING RECEIVER.**

Executors of *M<sup>r</sup>BRIDE v. CLARKE* and others; and other causes and matters.

*Mr. LITTON, Q. C.*, moved that it might be referred to the Master to tax and certify the costs due to Henry Southwell, as the attorney and solicitor of the late receiver in these causes.

*Mr. Southwell's* affidavit stated several classes of costs due to him as attorney and solicitor for the late receiver, and, amongst others, costs of evicting the interests of defaulting tenants, and of proceeding against their sureties, and also of re-letting the lands, all of which proceedings had been taken at the proper cost of *Mr. Southwell*, and under and in execution of the orders of this court.

*Mr. M<sup>r</sup>Kenna*, on behalf of several creditors, opposed this application. This is the solicitor of a defaulting receiver, who cannot be allowed his costs, until the balance which the Master has reported to be due from him to this cause, and for the non-payment of which he has been attached and removed, shall have been paid in. The Master has reported no less a sum than £54l. 12s. 9d. to be due from *Mr. Southwell's* client to this cause.

*Mr. R. Cotton Walker*, on the same side with *Mr. Litton*, submitted, that although as to the costs for which the receiver was personally liable, as for instance the costs of passing his accounts, his solicitor must look to him only; yet, the costs of the several proceedings taken by order of the court, and for which the receiver was not personally liable,—*e. g.* the costs of the ejectments, &c.—should be paid out of the funds in court to the credit of the cause, for in these proceedings *the court* is really the client. A different doctrine would be productive of the most serious inconvenience.

**MASTER OF THE ROLLS.**—I was at first disposed to think this application against principle; but, on consideration, am of opinion, that the

A defaulting receiver cannot have the costs of his proceedings, until the sum found to be due from him with interest, shall have been paid in. But where, at his own proper cost, and under the orders of this court, the solicitor of the receiver brought certain actions at law against defaulting tenants and their sureties &c. &c. *Held*, that the solicitor was entitled to be paid the costs of such proceedings out of the funds in court.

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v.  
CLARKE.

distinction taken by Mr. *Walker* should be observed; and that, as to the costs of executing its own orders, the court should, as far as it can, secure the solicitor. I shall, therefore, give Mr. Southwell his costs in the ejectments, and of proceeding to let the lands, &c., and of this motion.

Order.—Let the Master certify the amount of the taxed costs, at law, of the ejectments brought pursuant to the orders made in the first cause, bearing date, respectively, the 31st of March, 1826, and the 13th of November, 1826, and also of the proceedings at the petty-bag side of this court, on the recognizance of John Horan and his sureties, in pursuance of the orders, bearing date, respectively, the 25th of July and 13th of November, 1827, and declare the said H. Southwell to be entitled to be paid the amount of such costs out of the funds in these causes, with the costs of the present order. Refuse the rest of the motion: the court declaring that the costs of the late receiver in obtaining the several orders and reports mentioned in the said affidavit of H. Southwell, ought not to be paid out of the funds in these causes, until the balance of £541. 12s. 9d., certified to be due by him, with interest thereon, shall be paid.

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*Wednesday, February 6th.*

### COVENANT TO REDUCE RENT OF FREEHOLD FOR A CERTAIN SUM—PERSONAL ESTATE.

In the matter of LOUISE CROFTON, a minor.

Where G.C. made a lease for lives renewable for ever, reserving the yearly rent of £20, and thereby covenanted, that if the lessee, his heirs or assigns should be minded to fine down the said rent, it should be released on payment of £30<sup>00</sup>.

*Held*, that the said sum of £30<sup>00</sup>, being paid after the death of G.C., was personalty and should go not to his heir, but to his executor.

Mr. R. F. FRANKS, on behalf of the petitioner Frances Crofton, a creditor of George Crofton, Esq. deceased, the father of the minor, moved that the Accountant General might be directed to transfer to the said Frances Crofton or her attorney so much of the government 3½ per cent consols, then in the Bank of Ireland to the credit of this matter, as would be equivalent to the sum of £300, being the sum paid into bank to the credit of this matter, by the assignees of Henry Lanouze, to fine down the rent of £20 per annum, reserved by a lease made by the said George Crofton to the said Henry Lanouze, and pursuant to a covenant therein contained.

It appeared by the affidavit, &c., to ground the present application, that the petitioner was a simple contract creditor of the said George

Crofton, in the sum of £900 and upwards, being the amount of advances made by her to him, in the year 1832, and which he by letter acknowledged and promised to repay with interest. Within one year afterwards he died, without having made sufficient provision for his debt to the petitioner, and not having any available personal property, but seized of certain freehold premises at Kingstown in the county of Dublin, and leaving the minor, his only child, and heiress-at-law surviving him.

It also appeared, that the said George Crofton, by indentures of lease and release, dated the 1st Nov., 1829, demised to one Henry Lanouze and his heirs and assigns a part of the said freehold premises at Kingstown, for three lives, renewable for ever, at the yearly rent of £20; and that the last mentioned indenture contained the following covenant:—"And the said George Crofton doth hereby, for himself, his heirs and assigns, covenant, promise and agree, to and with the said Henry Lanouze, his heirs and assigns, that, in case the said Henry Lanouze shall be minded at any time during the term hereby demised to fine down the rent, that on payment of the sum of £300, the said rent shall be reduced from the sum of £20, and the said Henry Lanouze, his heirs and assigns, shall hold the said premises for the remainder of the term hereby demised, free from any rent whatsoever."

Under and in pursuance of this covenant, the assignees of Henry Lanouze, in the year 1836, came in by petition in this matter, and by leave of the court, paid into the Bank of Ireland, to the credit of this matter, the sum of £300, and obtained a deed of release of the said yearly rent of £20, approved of by the Master, and executed by the guardian of the fortune of the minor.

There were no specialty debts of the said George Crofton; and the sole question on this motion was, whether the sum of £300 paid in by the assignees of Lanouze was personal assets available for payment of George Crofton's debts, or part of the realty which should go to his heir?

An application precisely similar to the present was made last Trinity Term, but as there had not been at that time a personal representative raised to George Crofton, in this country, the motion stood over for that purpose. The question, however, was then discussed by the counsel, and considered by the court.

Mr. *R. F. Franks*, for the petitioner, submitted, that the covenant is in effect a conditional agreement to sell. That where the contract is absolute, but not executed until after the death of the contractor, the heir is a naked trustee for those entitled to the personal estate; and that the principle is the same, where the contract being conditional in its origin has become absolute by the performance of the condition. That

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in this case, the performance of the condition did not depend either upon the will of the heir or of the executor, but upon the tenant and his representatives ; and therefore, that the sum of £300 paid in by the assignees of Lanouze . was clearly personal estate, applicable to the payment of George Crofton's debts, *Laure v. Bennett* (a) ; *Townley v. Bedwell* (b) ; *Ripley v. Waterworth* (c).

A personal representative of George Crofton having been since raised, counsel now renewed his application.

MASTER OF THE ROLLS.—When the matter of this petition was moved some time ago, I looked into the cases then cited, and found that they sustained the application.

Order.—Declare that the sum of £300 in the petition mentioned, as having been paid into court, and invested in government stock, was part of the personal estate of George Crofton deceased, the father of the minor ; and let the Accountant General of this court transfer to the petitioner Frances Crofton, or to her attorney, so much of the Government 3½ per cent consols, &c., &c.

(a) 1 Cox. 167.

(c) 7 Ves. 425.

(b) 14 Ves. 590.

Thursday, February 7th.

## PRACTICE—BILL AMENDED AFTER ANSWER.

O'GRADY, v. BARRY and others.\*

The amended bill is *the bill* ; therefore, though the original bill may have been answered, an application that the amendments may be taken as confessed is improper : it should be, that *the bill* may be taken as confessed.

This was an application that *the amendments* should be taken as confessed against the defendants Richard Harrold and J. H. Barry. Since the notice of motion had been served, the answer of J. H. Barry had been filed, and the solicitor of Richard Harrold now appeared and stated that Harrold's answer had been prepared and sent to the country to him ; he therefore prayed the court to give a few days' time to file it.

The counsel for the plaintiffs said he did not object to Harrold's getting a few days to file his answer, and therefore, that he should only apply for the costs of the present application.

MASTER OF THE ROLLS.—You cannot have costs ; as your motion that "*the amendments* may be taken as confessed" is irregular. The

\* See the former application in this cause, ante p. 11.

amended bill is *the* bill, and therefore where the amendments are not answered, the *bill* is not answered, and your application should have been that the bill may be taken as confessed.—The parties consenting, the court ordered that the defendant R. Harrold should have one fortnight to file his answer, and no costs of this application.

No costs.

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Thursday, February 7th.

SALE UNDER DECREE—OUTSTANDING JUDGMENTS—  
ALLOCATION OF PURCHASE MONEY.

GREENE and another, v. ELLIOTT and others.

Mr. WM. BROOKE, Q.C., on behalf of the defendant, John Millett, having the carriage of the decree, moved, that it might be referred to the Master to inquire and report the several sums remaining due under the decree in this cause for principal and interest, arrears of jointure and annuities, and the costs of the several parties as decreed, as far as the purchase money of the lands already sold will extend; and that the said Master do report the same according to their respective priority; and that the said Master may be directed to set apart a sufficient sum out of the funds to pay the costs of this motion, and of the reference thereunder, and of drawing out the said funds; without prejudice to the purchaser's right to interest and costs, in case his said purchase shall not be completed.

Secondly; that the said Master may be at liberty to receive the charges of all such outstanding creditors of the said James Bradstreet Elliott, (under whom the defendant John Elliott derives) in the pleadings and the decree mentioned, who may have hitherto neglected proving their said demands, and who may now be inclined to prove the same; and that the Master may be at liberty to report the same when proved, notwithstanding his former report, and the final decree had thereon: or, for such other order, &c.

The lands of Grange and Kiltown, in the pleadings mentioned, had been sold under the decree in this cause, for the sum of £6,700, on the 30th of April, 1838. The purchase money had been lodged, and the sale confirmed; but the conveyance had not as yet been made, nor had the purchaser gone into possession, in consequence of a number of judgments not proved in the cause, appealing on record against the estate, each of which, the purchaser insists, is an objection to the title. Of those judgments, the greatest number had been paid, and warrants were being executed to satisfy them; and as to the others, notices had been served,

Though the purchaser objects that there are several outstanding judgments not proved in the cause, this court will, at the instance of the party having the carriage of the decree, refer it to the Master to ascertain the sums due under the decree, and to allocate the purchase money, without prejudice to the purchasers insisting that the said purchase money shall not be paid out until a clear title shall have been made, and under peril of the costs of reference in default of such title.



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calling on the parties to satisfy, release, or file a charge; or in the event of their refusal, that a supplemental bill would be filed against them to obtain a decree barring their respective rights, if any they had. Counsel submitted, that there could be little doubt the parties having claims would file charges as soon as an order for that purpose should have been obtained; and that it was confidently expected a perfect title could be made to the purchaser, who, as he said, would not be prejudiced by the order sought.

Mr. *Ryan*, for the purchaser, said that there appeared twenty-four judgments on record against this estate, and not proved in the cause; and though warrants had been obtained to satisfy several of them, the purchaser could not agree to the purchase money being paid out upon such a state of the title.

MASTER OF THE ROLLS.—I think the order sought will expedite matters, and that I may make it without prejudice to the purchaser's objection.

Order.—Refer it to the Master to report the several sums remaining due under the said decree for principal, interest, and costs to the several parties according to their respective priority as decreed; and let the Master report the funds in Bank standing to the credit of this cause, applicable to pay the said sums and costs, and let the Master allocate the said funds among the said parties as decreed; and let such of the solicitors as claim liens upon the said costs as decreed, ascertain such lien by affidavit; and let the Master have regard thereto in allocating the said funds. And let the said Master, in allocating the said funds, set apart a sum sufficient for the costs of this motion and of the reference, and report thereunder, and of the order for paying out said funds; and let this order be without prejudice to the said purchaser insisting that his purchase money shall not be paid out until clear title shall have been made to the lands and premises purchased by him under the decree in this cause. If such title is not made out, let this reference be at the expense of the defendant *J. Millett*, having the carriage of the decree; and let the Master be at liberty to receive the charge of any judgment creditors of said *J. Bradstreet Elliott*, and *Richard B. Elliott*; and let the Master report whether any and what sum is due to any of the said creditors who may file charges under this order; and let them be at liberty to apply against the said fund as they may be advised.

*Friday, February 8th.*

RECEIVER—HEAD-RENT IN ARREAR—LANDLORD'S  
APPLICATION FOR LEAVE TO PROCEED AT  
LAW—COSTS.

WALSH v. WALSH, and others.

Mr. H. GRAVES, on behalf of the Earl of Huntingdon, a third person, moved, that notwithstanding the receiver in this cause, his lordship might be at liberty to proceed at law as he might be advised, for recovery of one year's head rent of the premises in the pleadings mentioned, due up to, and for the 1st November, 1838—The amount of the rent was £122; and repeated applications had been made to the receiver, but without effect.—[MASTER OF THE ROLLS. It is really a very hard case upon landlords that they are to be at the cost of applications of this kind, in consequence of the default or negligence of the receiver. Does it appear that the receiver in this cause had any funds with which he have might paid your head rent?—Yes: It appears that he passed his last account upwards of a year ago; and therefore, must since have received considerably more than sufficient to pay the head rent due to us.

The receiver over a lease hold or other derivative interest or estate should pay the head rents regularly. If the landlord is obliged to apply for leave to proceed, the court will make the receiver pay the costs of the application, if he had funds to pay the rent; or otherwise, give the landlord the costs of his application against the funds in the cause.

MASTER OF THE ROLLS.—In every case of this kind, I will, if I can, give the landlord his costs; and, as it appears that it is by the default of the receiver in this cause that the present application is necessary, I will make him pay the costs of it. I am disposed to think, that in cases of this kind, the landlord's best course would be, to proceed at once for his rent, without any application to the court; I certainly would not attach him for such a proceeding.

*Seemle,* that the landlord might proceed for his rent without asking the leave of the court.

Mr. Dixon, Q. C., stated, that the practice just now suggested by the court was that which prevailed in Lord Clare's time, when applications of this kind were not deemed necessary; but the landlord proceeded at once. It was Lord Redesdale who changed the old practice, and required an application such as the present, which frequently operated as a serious tax upon the landlord.

MASTER OF THE ROLLS. I am very much obliged to you Mr. Dixon, for the precedent, and I think we had better go back to the old practice. However, I will, as far as I can, make either the receiver, or the funds in the cause, bear the costs of all future applications of this kind; and I shall now make a precedent.

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per acre, subject to the covenants, &c. That the said indenture contained a covenant that the defendant, his executors and administrators, should, at the expiration or other sooner determination of the said demise, yield and deliver up the said lands in good tenantable order, &c.

That, in a few months after the defendant had obtained possession under said lease, he applied to the plaintiffs for a reduction of 7s. 6d. per acre in the rent, which being refused, he threatened he would break and plough up the ancient meadow and pasture fields of said lands; and that the said lands have since been greatly deteriorated, by the wilful mismanagement and improper cultivation thereof, by or on the part of the said defendant; and that, notwithstanding several cautionary notices from the plaintiffs, calling on him to desist, he had, since the 28th of January last, broken and ploughed up upwards of 26 acres of the best and primeest of the ancient meadow and pasture fields of the said lands.

The bill prayed that the defendant might answer, &c., and set out a distinct and separate account of how many acres of the ancient meadow and pasture lands, demised to him as aforesaid, had been broken and ploughed up, and to what amount the value thereof has been deteriorated with the defendant's privity or consent, since the 27th of April, 1838; and that the said defendant might be compelled to make satisfaction to the plaintiffs for all the waste done, permitted, committed, or suffered by him on the said ancient meadow and pasture lands,—the plaintiffs waiving all forfeitures and penalties incurred by the said defendant on account or in respect of the said waste; and that the said defendant might be compelled to lay down and restore, to their former plight and condition, the said ancient meadow and pasture lands, &c.; and that the said defendant might be decreed to manage and cultivate the said lands in a proper and husbandlike manner, according to the custom of the country, during the continuance of his interest therein; and that he might be restrained from ploughing up or breaking the remaining pasture and ancient meadow lands of the said demised premises, and from committing or permitting any other waste or spoil on the demised premises; and that all proper directions might be given for effectuating the purposes aforesaid: and that the plaintiffs may have such other and further relief, &c.

Upon the foregoing bill, the court ordered, that the defendant be restrained, &c. unless cause in ten days after the service of the order, and that he do stop in the mean time.

The defendant, by his answer, admitted the lease, and the breaking up of the ancient meadow and pasture lands, as stated in the bill; but stated, that during the negotiation for the lease, he had distinctly apprised the plaintiffs, that his object in taking the said lands was to cultivate them in tillage. That during the said negotiations, the plaintiffs never said any thing of restraining tillage; and that he would not have agreed to take the lands, unless he conceived he should be at liberty to break up the same, and every part thereof, for tillage.

That having agreed to take a lease, the plaintiff Fletcher (who ap-

peared as the principal throughout the entire transaction, the plaintiff Shew merely assenting to what Fletcher did,) insisted that it should be prepared by his own attorney, but at the defendant's expense; and the defendant having agreed thereto, Fletcher instructed Mr. J. P. Smith, a stranger to defendant, to prepare the draft lease. That the said draft lease was accordingly prepared by the said J. P. Smith; and that the defendant did not know any thing of its contents till he heard it read in the presence of the plaintiffs. That upon the said draft being so read, the defendant perceived it contained a covenant restricting tillage, and immediately objected thereto. That Fletcher endeavored to persuade him to permit the said covenant to stand; but that defendant, having peremptorily declared he would withdraw from the agreement, unless he should be at perfect liberty to apply as much of said lands as he thought proper to the purposes of tillage, the said Fletcher consented that the lease to be executed should not contain any covenant of that kind, and the same was accordingly struck out, as by the said original draft, in the possession or procurement of the plaintiffs, &c., would appear. That the bill of costs, furnished by J. P. Smith to defendant, for preparing the said lease, contains, amongst others, the following passage:—"Having obtained said draft lease from counsel, and the parties having required that I should attend them therewith—Attending them accordingly, and reading over Mr. Weir's proposal to become tenant to the said lands, when same was agreed to, and signed by the said lessors; also perusing and conferring on said draft lease, when Mr. Weir objected to a covenant therein, as to breaking up land, &c., when, after much discussion, said clause was relinquished by said lessors," as by said bill of costs, endorsed by defendant at the time of swearing his answer, &c. will appear.

The defendant admitted that he had made application for a reduction of the rent, which had been refused, but that the plaintiff Fletcher had offered a reduction of five shillings per acre, if defendant would take out a new lease, containing a covenant such as that struck out of the original draft lease. The defendant denied the deterioration of the lands, and gave an account of the number of acres of meadow land which had been broken up.

The plaintiffs having been called on by notice so to do, produced upon this motion the draft lease, which fully corroborated the statement in the answer respecting it. The attorney's bill of costs also was produced, containing the passage as stated in the answer. None of the defendant's facts were controverted; but the present solicitor for the plaintiffs made an affidavit, stating that when the reduction of 7s. 6d. per acre was refused, the defendant threatened to break up the ancient meadow and pasture as stated in the bill; that it had been necessary to enforce the last half year's rent *by distress*; and that the defendant had let some of the rich meadow land in con-acres.

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The counsel for the defendant contended, that the facts admitted before the court shew a positive agreement of the parties, that the defendant should be at liberty to break up as much ground as he pleased; that if the defendant had not, as it was contended he had, a perfect defence in the special contract of the parties waiving the obligation which the law would have otherwise imposed on him; yet, under the circumstances, a jury would not give one farthing damages; and where that is so, a court of Equity will not grant an injunction.

Mr. *Blackburne*, Q. C., for the plaintiffs, *contra*.—The lands broken up are confessedly ancient meadow; this then is a case of actual waste; and it appears that the defendant has let part of the lands in con-acres. The omission of the covenant restricting tillage did not give the defendant a right to commit waste.—[MASTER OF THE ROLLS. The defendant's equity is this, that he took the lands as a tillage farm, for tillage only, and with the express consent of the plaintiffs.]—The plaintiffs did not consent that the defendants should till the meadow and pasture lands; it never occurred to them, that any thing of the kind would have been attempted. When they gave up the covenant restraining tillage, they did not mean thereby to waive the general protection of the law, or to enter into a positive agreement that the defendant should be at liberty to commit waste without limit.

Mr. *Boswell*, the solicitor for the plaintiffs, informed the court, that since the bill was filed in this cause, it had been discovered, that several other acts of waste, not mentioned in the bill, had been committed, and asked that the present motion might stand over, to give the plaintiffs the opportunity of making a supplemental affidavit as to the additional waste.

MASTER OF THE ROLLS.—No; there is an answer in this case, and after that, you cannot have an affidavit to state acts of waste not stated in the bill. There may be an affidavit as to matters collateral to the statement in the bill, but not of matters making an additional case.

His Honor then asked for a copy of the pleadings, and for the draft lease produced by the plaintiff, &c., and said he would make his order on the following day.—Accordingly, upon the next day, without further observing on the case, His Honor made the following order:—

Order.—The court on reading the pleadings, the affidavit of J. K.

*Boswell*, the draft of the lease referred to in the answer of the defendant, which was produced by the plaintiffs, in pursuance of a notice for that purpose served by the defendant—the court doth allow the cause shewn against the conditional order bearing date the 11th day of February, instant, without costs, and without prejudice to such proceedings at law, as the complainants may be advised to take against the defendant, in relation to the matters in the complainants' bill stated.

# NEW AND AMENDED GENERAL ORDERS

OF THE

## COURT OF CHANCERY IN IRELAND,

*To come into operation from and after the 1st of March, 1839, in pursuance of the 4 & 5 Wm. 4, c. 78.*

### LORD CHANCELLOR.

*The 4th February, 1839.*

In pursuance of the provisions of an act passed in the 4th and 5th years of the reign of his late Majesty King *William* the Fourth, chapter 78, entitled, "An act for the amendment of the proceedings of the High Court of Chancery in Ireland," and in order to explain and amend some of the Orders heretofore made in pursuance of the said act; IT IS ORDERED by the Right Honorable the Lord High Chancellor of Ireland, by and with the advice and assistance of the Right Honorable the Master of the Rolls, that from and after the 1st day of March next, the several orders which hereafter follow shall be observed in all suits and proceedings now pending, or which shall hereafter be instituted or had in the said court; and that so much of the General Orders bearing date the 29th day of November, 1834, and amended, pursuant to the General Order bearing date the 8th day of June, 1835, in order to carry into effect the provisions of the said act, as are altered by, or inconsistent with the orders now made, shall be, and the same are hereby annulled and rescinded; and that such of them as are hereby amended or varied, shall, as so amended or varied, be deemed the orders of the said Court, and observed accordingly.

I.—That whenever under the provisions of the 34th of said General Orders, the plaintiff shall elect to have the costs incurred by him in appearing for a defendant serving notice to answer, or issuing processes to enforce an answer, deemed costs in the cause, such costs shall be deemed to be recoverable only from the defendant, for whom such appearance shall have been entered, or upon whom such notice shall have been served, or against whom such process shall have issued, unless the Court shall, by a special order, or by a decree, otherwise direct.

II.—That so much of the 37th of the said amended orders, as directs that said order shall not extend to proceedings under the statute of the 2nd year of the reign of his then Majesty King *William* the Fourth, chapter 33, and the statute of the 4th and 5th years of the reign of his said Majesty, chapter 82, be, and the same is hereby rescinded; and that in any suit now depending, or hereafter to be instituted, in case the plaintiff shall obtain an order to have any defendant residing out of the jurisdiction of this Court, served with process to answer under the provisions of the said acts, or either of them, he shall cause such defendant to be served at the same time at which, and in the same manner as the subpoena to answer may be served on

him, with a notice, stating that in case the answer of such defendant shall not be filed within the period of four months from the day on which such writ of subpoena is returnable, which day shall be mentioned in such notice, the plaintiff will apply to the court to have the bill taken as confessed against such defendant; and the Court, on being satisfied that such notice has been so served, may, in case the answer of such defendant has not been filed, order or decree, (as the case may be,) the bill to be then taken as confessed against such defendant, or that it shall be taken as confessed against him, in case his answer shall not be filed within such further period as the court shall deem reasonable to be allowed for filing such answer.

III.—That in case any witness, after having been sworn before an Examiner, whether in chief or otherwise, shall absent himself, or become by illness incapable of proceeding to give his evidence, before his examination shall be finally closed, such Examiner shall be at liberty to proceed with the examination of any other witness or witnesses; and in such case he shall specially certify the reasons for proceeding with the examination of such other witness or witnesses before the examination of the former witness was closed.

IV.—That in case the Master shall be of opinion, that it is expedient or necessary to proceed on any reference made to him, either by decree or order, within a shorter period than that allowed by the 151st General Order for issuing and serving a summons under such decree or order, he shall be at liberty to permit any party interested in proceeding on such reference, to issue a summons to proceed under such decree or order, at any time after such decree or order shall have been brought into his office by such, or any other party; and every summons so issued, and

every subsequent summons, shall be served such time or such number of days as the Master shall direct, before the day fixed for attending the Master thereon; and he shall also be at liberty to fix the time within which any objection to his Report under such decree or order is to be filed; and the Master shall specially certify in each case of proceeding under this order, that he has thought it necessary or expedient to do so.

V.—That in every case the summons for taking the Master's general directions, and any other summons issued on any reference, shall, whether the proceedings shall be under a decree or under an interlocutory order, be served such number of days, or such time, as the Master shall direct, before the day fixed for such summons for attending the Master thereon.

VI.—That any party who lodges the draft of personal interrogatories shall, on the day of lodging the same, issue a summons for the Master to limit the time for filing an answer thereto, and if necessary to settle the same: and such summons shall be served forty-eight hours before the time appointed thereby for attending the Master thereon; and the Master shall on such summons fix the time for filing an answer to such interrogatories, and shall, also, if the party to be examined shall then require it, but not otherwise, settle such interrogatories; and if the answer shall not be filed within such period, the Master shall be at liberty to give a certificate, that process shall issue to enforce the examination, and thereupon process of attachment or sequestration shall be issued by the Clerk of the Appearances and Writs, without further order, in like manner as in the case of an answer not being filed to an original bill; and the attachment when issued to enforce the answer to personal interrogatories, shall contain a clause, that the par-

ty when arrested shall be detained in close custody, until discharged by the order of the Court or of the Master.

VII.—That the Master shall be at liberty to receive further evidence, as to any matter depending before him, notwithstanding that he has issued his summons to settle his report, if he shall think it necessary to do so; but in every such case the Master shall, by an order then made by him, direct by, and to whom the costs occasioned, or to be occasioned thereby to any party or parties, shall be paid, and the amount of such costs shall be paid accordingly; and on the certificate of the Master stating the amount of such costs, and by whom and to whom the same are to be paid, an order for the payment thereof on demand, together with the sum of £2. 10s. for the costs of said certificate and order, and the service of such order, shall be entered as of course by the Register; and in default of payment, such proceedings for the recovery thereof may be taken as can be had for non-payment of any sum ordered by the Court to be paid.

VIII.—That in every case in which a Receiver, Sequestrator, or Guardian shall submit to the Master any proposal or statement for the management or letting of any property over which he may be appointed or acting, or any statement of special facts respecting any tenant of such property, or otherwise in relation thereto, such Receiver, Sequestrator, or Guardian shall state in such proposal or statement the time at which the proposal or statement, if any, submitted by him to the Master next before the time at which the proposal or statement then submitted was presented; and the Master shall, on every such proposal or statement being submitted to him, consider whether the matter thereof might have been submitted to him when the previous statement or proposal, if any, was

submitted; and also, whether it is of such a nature as to make it necessary to have it submitted to him separately, or at the time at which it was submitted, and he shall in every case, by an order to be made on every such statement or proposal, direct that such Receiver, Sequestrator, or Guardian shall not be allowed the costs of such proposal or statement, or any proceedings connected therewith, if he shall be of opinion that the subject matter thereof might have been included in any former proposal or statement, or that it was not necessary to have such statement submitted separately to him at the time at which it was submitted, or if for any other reason he shall deem it unnecessary or improper to have such statement or proposal submitted to him; and in no case shall any Receiver, Sequestrator, or Guardian be entitled to the costs of any proposal or statement submitted by him to the Master, unless the Master in his report thereon, or by an order to be entered in his book of orders, shall certify that such statement or proposal was, in his opinion, a proper one to have been submitted to him by such Receiver, Sequestrator, or Guardian.

IX.—That so much of the 189th General Order, bearing date the 29th day of November, 1834, as directs that in all cases where rent is due by a tenant, the Receiver, Sequestrator, or Guardian, before any further proceedings to enforce the same, shall serve a notice in writing upon the tenant, specifying the amount of rent then due, and the place where, and the time (not being less than one month from the service of the notice,) when the Receiver, Sequestrator, or Guardian will attend to receive the rents, be rescinded; and that it shall not be necessary in any case, before any proceeding to enforce the payment of any rent by a tenant shall be taken, that any such notice



shall be served, and every Receiver, Sequestrator, or Guardian shall be at liberty, whenever rent shall be in arrear for the space of five months after the same shall have become due, or as soon as, or at any time after any rent shall have become due, if the Master shall deem it expedient to allow him to do so, before the expiration of such five months, to proceed by distress for recovery of such, without any rule or order for that purpose, such remedy to be deemed the proper one to be adopted in the first instance; but when the Receiver, Sequestrator, or Guardian shall find the remedy by distress insufficient or inapplicable, he shall lay the special facts before the Master, and if the Master shall deem it expedient to proceed by notice to quit, by action, or by civil bill ejectment process, or by ejectment for non-payment of rent, the Master shall make an order accordingly, and thereupon the Receiver, Sequestrator, or Guardian shall be at liberty to proceed as the Master shall direct; and in every case in which the Master shall be of opinion that the Receiver, Sequestrator, or Guardian should proceed by attachment, and not by distress, for non-payment of any rent, the Master being first satisfied that rent is in arrear, and that the General Order to pay such rent to the Receiver, Sequestrator, or Guardian, has been duly served, and that the rent although demanded by the Receiver, Sequestrator, or Guardian, or by his Agent duly authorized, has not been paid, shall be at liberty to give a certificate, that an attachment shall issue for non-payment of such rent, stating to what period such rent is calculated and the amount of the rent claimed to be due: and thereupon the Register shall enter and issue an order, that the tenant shall pay to such Receiver, Sequestrator, or Guardian, the rent mentioned in

such certificate to be due, the amount whereof shall be stated in such order, together with the sum of £2 10s., as and for the costs of such certificate and order, and service of such order, within ten days after personal service of such order, or shew cause within the same period, why an attachment should not issue against him for non-payment of said rent; and in case the same shall not be paid, or good cause shewn within said period, the Clerk of Appearances and Writs shall, on being satisfied by affidavit that such order was duly served, without any further rule or order, issue an attachment against such tenant for non-payment of said sums.

X.—That all third persons coming in under a decree or order in any cause or matter, and establishing an uncontested claim, shall be allowed such sum, not exceeding £5, as the Master shall deem reasonable, as costs for proving such demand, such sum to be added to the demand and paid according to the priority thereof; and when the demand of any third person coming into the Master's office under a decree or order shall be contested, such party shall be allowed, as against the funds, and in the same priority with his demand, such costs as the Master shall deem reasonable; or the Master shall, if he shall think it right, award such costs to be paid to such party, by the party opposing his claim; and an order shall issue on the certificate of the Master, stating the amount of such costs, and by, and to whom the amount thereof is to be paid, for the payment thereof accordingly, and of £2 10s. for the costs of such order and certificate, and the service of said order; and in case any third party coming into the Master's office under a decree or order, and claiming any demand to be due, shall fail in establishing his de-

mand, or shall not establish it to the full amount claimed by him, the Master shall be at liberty to direct that such sum as he shall deem reasonable shall be paid by such third party, to any person who may have contested his claim, as and for the costs incurred in contesting the same, and an order shall issue on the certificate of the Master, as to the amount of such costs, and by, and to whom the amount thereof is to be paid, for payment thereof accordingly, together with the sum of £2 10s. as and for the costs of said certificate and order, and the service of such order.

XI.—That the Master shall be at liberty, at the instance of any of the parties interested, or at his own discretion, to direct that any balance certified by him to be in the hands of any Receiver, Sequestrator, or Guardian, on passing his account, or any portion thereof, which may not be required to be paid to any suitor or other person, shall, within such time as he shall direct, instead of being paid into bank in cash, be invested in the purchase of government stock, and transferred to the credit of the cause or matter, or such particular account or credit therein, as a balance on such account, or any portion thereof may have been ordered to be lodged, such transfer to be made with the privity of the Accountant General; and the Receiver, Guardian, or Sequestrator shall accordingly invest the same, and transfer such stock, as directed by the Master, deducting such sum, if any, as the Master shall direct, for the costs of such transfer, and charging such costs in his next account, if no order for such deduction shall be made; and an order for such investment shall be entered, as of course, on the direction of the Master to have the same made.

XII.—That in all cases in

which, by an order, any stock or debentures shall have been ordered to be transferred or paid to any person, and before such transfer or payment shall have been made, pursuant to such order, any interest or dividends shall have been received on such stock or debentures, the Accountant General shall draw in favor of the person to whom such stock or debentures may have been ordered to be transferred or paid for the interest or dividends so received.

XIII.—That whenever in any reference now pending, or which hereafter may be pending, before a Master, in any cause or Matter, any of the parties in such cause or Matter shall not have appeared by his solicitor, or adopted an appearance entered for him by the plaintiff, the Master shall be at liberty, if he shall think fit, and in case he shall think it necessary, that any summons or notice of proceeding on said reference shall be served on any such party, to direct that, together with the first or any other summons or notice to be served on such party, a notice shall be served, signed by the said Master, requiring him to appoint some solicitor, having his place of residence or lodgings in Dublin, duly registered, upon whom, or some dwelling-house within the limits of the Circular-road, at which all other summonses or notices of proceeding on such reference to be served on him, shall be served, and stating that if he shall not do so, no further notice or summons will be served on him, and that the Master will proceed in his absence; and in case the party so served shall make any such appointment, it shall be made within such time as the Master shall in such notice direct; and such appointment, if it shall be one of a solicitor, shall be made in the same manner as if he was originally appointed in such cause or matter, and notice of such ap-

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sheriff should or could receive or come by; and that he the said Sub-sheriff would give a just and true account of such fees and other emoluments, and would verify the said account by affidavit, and pay them the money due on foot of such account in manner following (that is to say): The proceeds of all fees and emoluments received in, or legally belonging to the said office, to be distributed in the following manner, viz.—the first £2,400 (if so much shall be received) to the High Sheriffs, share and share alike; the next £800 (if so much shall be received) to Sub-sheriff; and all surplus, if any, after the receipt of the said two sums of £2,400 and £800, to be divided between the High Sheriffs, share and share alike. And the High Sheriffs thereby empowered their said Sub-sheriff to recover and collect from all concerned all *lawful fees, perquisites, profits, commodities, and advantages, to the said office lawfully belonging*, (the yearly rent, customs, revenues, tolls, fines, forfeitures, advantages by the vacancy or fall of offices in the said city, and all other allowances theretofore conferred on the said Sheriffs by the Lord Mayor, Aldermen, Commons, and Citizens, for the better support of the said office only excepted), and to use and take all lawful ways and means for obtaining and recovering thereof. Sub-sheriff to provide a hangman, ropes, carts, and instruments, and to attend the High Sheriffs with the jurors' books; not to interfere in the nomination of jurors, unless required, nor to interfere in elections of Members of Parliament, and to sue out and deliver to the High Sheriffs a sufficient and legal *quicquid* or discharge from the said accounts concerning the office of High Sheriff, on or before the last day of Easter Term, 1837, or in default to pay £1000 penalty. The High Sheriffs not to interfere with Sub-sheriff in executing the office of Sub-sheriff during their year of shrievalty, &c.

The plaintiffs stated, by their bill, the provisions of the above deed, and charged that the fees, profits, and sums of money received by Ponder, the said Sub-sheriff, thereunder, during the plaintiffs' year of shrievalty, greatly exceeded the said sum of £2,400, viz., by a sum of £2,000, making in the whole £4,400, and that the schedule furnished by him does not contain a true account of his receipts, and that during the said year there was received by the said defendant, or by one George Fearon, for his use, or for the use and benefit of them both, or for the use of some other person or persons, certain fees, profits, perquisites, emoluments, and sums of money appertaining or incident to, or alleged to be, and demanded as belonging to such office of Sheriff or Sub-sheriffs, over and above the sums set forth in the said schedule as the only sums of money received by him, or for his use, during such year; and in particular, that defendant, or Fearon, or some person acting under his authority as Sub-sheriff, demanded and received, among other fees, certain sums of money, for writs and other processes, charging for the same at the following rates, viz.:—For every *venire*, 2s. 2d.; for every *distringas*, 3s. 4d.; for every bail bond, £2. 10s.;

for every writ of inquiry, £1. 11s. 6d.; being rates far exceeding those admitted by the defendant in his said schedule. And further, that the defendant, or Fearon, acting in his name, made further profit of said Sheriffs'-office, by receiving, through the hands of the auctioneer appointed by the Sub-sheriff, portions of the auction fees which the auctioneer charged for executions: for instance, that the said auctioneer charged for many executions by *feri facias*, levied by him, a *lodging fee*, as called by said auctioneer, and for commission, certain sums on each execution; one moiety of which lodging fees, and one moiety of which commission, or some portion of same, was handed over to the defendant or the said George Fearon, and was so handed over by agreement with the defendant and George Fearon, by Thomas Lindley, the auctioneer, and that the same were received by them in the right or on the account of the plaintiffs, who were entitled to an account thereof. And the plaintiffs, by their bill, charged, that by the terms of the deed of September, 1835, the plaintiffs are entitled to a full account of all sums received in said office, or receivable by defendant, as Sub-sheriff, whether the same were received or receivable as fees, profits, perquisites, or emoluments, or in any other way arising out of or paid into said Sheriffs'-office.

The bill also charged, that one of the plaintiffs, in the month of July, 1836, saw a book in which the fees were entered by the defendant, and which, it appeared, up to that time amounted to £2,000, or thereabouts, and that defendant had confessed to one of the plaintiffs, "that the office was paying well." The plaintiffs, by their bill, admitted having received £1,800; and charged, that defendant had refused to give them any more, or to render an account, and had also neglected to pass their account in the court of Exchequer, or obtain them a *quietus*.

The plaintiffs' bill also charged, that by an order of the House of Commons, in April, 1838, an account was required of emoluments of the office during the plaintiffs' year of shrievalty, which order they called on Ponder to comply with, but which he had neglected and refused to do, whereby the plaintiffs would be rendered liable to pecuniary loss, and the displeasure of the House.

The defendant, contending that the discovery sought would criminate himself, some of the fees received being illegal, put in several answers which were reported short, but finally made a full discovery of the sums actually received.

Mr. *Litton*, Q. C., and Mr. *Smyly*, for the plaintiffs.

Messrs. *T. B. C. Smith*, Q. C., *Keatinge*, Q. C., *Dickson*, Q. C., and *Wright*, for the defendant.

1. The contract is an illegal one; the court cannot enforce it at all. The deed is a letting to farm of the office, and contrary to the general

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policy of the law, and also in express violation of the act 12 G. 1, c. 4, sects. 7 and 8. The bill must therefore be dismissed. *Odley v. Brown* (a); *Knowles v. Haughton* (b); *Ewing v. Osbaldeston* (c); *Dorcer v. Opie* (d).

2. Even if the contract were not originally illegal, yet the object of this suit being to obtain a participation in illegal gains and fees, the bill must be dismissed. The only legal fees are those contained in a book published by the King's Printer in 1734.

[It was objected that this book had not been proved in the case. The Lord Chancellor admitted the objection, and rejected the book.]

3. At the worst, the account can only be directed as to such fees as were legally received. *Knowles v. Haughton* (b).

Mr. Smyly, for plaintiff, in reply.

1. The original contract is not illegal. The statute 12 G. 1, c. 4, is intended to prevent the office being set up to auction, but does not prohibit the High Sheriffs from receiving the sums necessary to meet the heavy expenses to which their office exposes them. The deed is according to the precedent in use time out of mind. Besides, that question is not open to the defendant on the facts of this case. *Green v. Weaver* (e) shows that a party may contract himself out of the equity of the court.

2. The only question remaining is, whether the defendant has proved that any of the fees received were illegal? There are two classes of fees received: those which are settled by some statute, and those which rest on custom. It is admitted that the statutable fees have been rightly charged; it is the other class of fees which it is said have been illegally received. The plaintiffs have proved the custom for many years back, and that the fees received are the usual and customary fees. Where no statute intervenes, the legal fees are the customary fees. *Martin v. Slade* (f).

Friday, February 1st, 1839.

LORD CHANCELLOR.

I have maturely considered this case, and I have no doubt on any part of it. I think I am bound to give the plaintiffs a decree with costs. The first defence set up is, that the deed of deputation is illegal, and contrary to the statute 12 G. 1, c. 4. I am clearly of opinion that it does not come within that statute. The law authorises High Sheriffs to discharge a portion of their duties by a Sub-sheriff; and the deed does

(a) 1 B. & B. 360.

(c) 2 Myl. & Cr. 53.

(e) 1 Sim. 427.

(b) 11 Ves. 168.

(d) 2 Eq. Ca. Ab. 1.

(f) 2 New R. 59.

nothing more than give a reasonable salary for the duty imposed on the Sub-sheriff, which salary is to be paid out of the fees of the office. The agreement is, that the first £2,400 should be paid to the High Sheriffs, to discharge the expenses to which they are exposed by their office; and that out of the residue of the fees received, if any, the Sub-sheriff should be paid £800 for his labor, the further residue to be paid to the High Sheriffs. There is nothing illegal in this; it is the common course of dealing between High and Sub-sheriffs, affirmed by usage for many years, and perfectly legal. Then, the defendant admits that he received fees and perquisites to the amount of a greater sum than £2,400 by virtue of the office, but he takes upon himself to say, that part of those fees were illegally received. If he had proved they were, I might have had some difficulty in the case; but there is a total absence of evidence of his having received any illegal fees, and the plaintiffs have proved that the fees received were the usual and accustomed fees. The defendant, therefore, having failed in establishing any illegality in any of the fees received by him, I must take them to have been legally received; consequently, there is no ground whatever on which that defence can be sustained. The answer admits the receipt of more than £2,400, and the plaintiffs admit that £1,800 has been paid. The defendant does not allege that he paid any greater sum to the plaintiffs than £1,800; and, consequently, the plaintiffs are entitled to a decree for the balance, being £600. The defence in the case is a very audacious one. The defendant admits the receipt of the fees, and the case he makes is, that he extorted a portion of them from the public. If the law had been in his favor, I must have given him the benefit of it; but, as it is, I must give the plaintiffs their relief, with costs.

*Jan. 1339.*

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## ROLLS.

*Wednesday, January 30th.*

## PRACTICE—POST COSTS AFTER ALLOCATING ORDER.

*BIRCH v. ALT and others.*

Where, after an order to pay out a deficient fund to the parties as reported, the plaintiff was obliged to take further proceedings in the cause for the costs of which the order did not provide and no application was made until after all the creditors except one had drawn out the sums respectively allocated to them—

*Held*, that the plaintiff was entitled to be paid the amount of the costs necessarily incurred by such further proceedings, out of the remaining share.

An affidavit made to resist a motion may be used on the motion notwithstanding that it has been referred for impertinence and scandal, and that the reference is still pending.

Mr. SMITH, Q. C., with whom was Mr. *Rolleston*, on behalf of the plaintiff, moved for a reference to the Master to tax the plaintiff's post costs, incurred since the order for payment out of the funds in this cause, dated the 18th of June last, and not provided for by said order, including the costs of this motion, and of the motions made for the purpose of having the deed of conveyance to the purchaser executed by the Master, in the name of the defendant Catherine O'Brien, pursuant to the statute, and of having such deed so executed by the Master; and that out of the sum of £63. 19s. 6d., by said order of 18th June, directed to be paid to Bridget Fitzpatrick, since deceased, after payment of the prior sums and costs decreed, and in further execution of said order, that the Accountant General do draw in favor of the plaintiff, or his attorney thereto lawfully authorised, for the amount of such costs, when taxed and ascertained; and that the Accountant General do draw in favor of James Fitzpatrick, administrator *de bonis non* of James Fitzpatrick deceased, in said report named, for the residue of said sum, after the payment of such costs.

The allocating order in this case provided only for the costs of obtaining that order, and the Master's report. The proceedings, which afterwards became necessary in this cause to perfect the conveyance to the purchaser under the decree, were not in contemplation when the order to pay out the fund was made, and therefore could not have been provided for by that order. The plaintiff is plainly entitled under the decree to the costs of these subsequent proceedings; and the only question is, whether the order to pay out the fund absolutely determines the authority of the court over the fund, before the order is executed or the transfer actually made? We submit that it does not: *Angel v. Haddon* (a); *Gillespie v. Alexander* (b).

Mr. *Fogarty*, Q. C., with whom was Mr. *O'Shaughnessy*, *contra*.—This case is very different from those just cited: in those cases the parties coming in had charges on the estate; but here the gentleman

(a) 1 Mad. 529.

(b) 5 Russ. 130.

who was formerly the solicitor in this cause, is really the person making the present application.

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*Mr. Rolleston.*—The affidavit, which Mr. Fogarty is just now opening to the court, has been referred for impertinence and scandal, and therefore pending the reference cannot be used.

*MASTER OF THE ROLLS.*—The pendency of such a reference does not exclude the use of an affidavit on the motion, to resist which it was made: if the affidavit be read, I can either dispose of the matter of reference at once, or make my order upon this motion without prejudice to the reference.

*Mr. Fogarty*, in continuation.—Under the order to pay out the fund, all the parties, with the exception of Mrs. Fitzgerald, have drawn the several sums respectively allocated to them; and the single share now remaining would also have been drawn out, but that Mrs. Fitzgerald died in a few days after the order was obtained. That order was obtained by the plaintiff, and provided for his post costs.—[*MASTER OF THE ROLLS.* No; not for post costs, but for the costs of that order and the report.]—For all the costs the plaintiff asked; and those costs have been taxed only *pro forma*, without the presence of an adverse solicitor, or any opposition. If the plaintiff should carry his present motion we would be entitled to have those costs taxed; but we submit, that under the circumstances, the plaintiff is not entitled to be paid any portion of the sum allocated to Bridget Fitzgerald, and which, but for the fatality, would have been drawn out long since.

*Mr. Rolleston*, in reply.—The single question before the court is that already stated by Mr. Smith, whether the order to pay out the fund extinguishes the authority of the decree, or, in other words, whether the plaintiff's prior and unquestionable right under the decree is too late after an allocating order? This question has already been expressly ruled by this court, in the case of *Otway v. Nestor*, in which an application almost precisely similar to the present was made, in Hilary Term 1838.—[*MASTER OF THE ROLLS.* I remember that case, and was just now making inquiry about it].—It was a creditor suit, in which, after an allocating order, and the fund had been in part drawn, Nestor the defendant died; and as it was necessary that his representative should execute the conveyance to the purchaser under the decree, the plaintiff was obliged to file a supplemental bill to bring the representatives of Nestor before the court. Afterwards the plaintiff made an application similar to the present for the costs of the supplemental proceedings, and it was strongly urged on the part of such of the creditors as had not yet received the sums respectively allocated to them, that after



Jan. 1839. an allocating order the plaintiff came too late ; that the order transferred the property in the fund to the several parties, so that no fund remained in court on which the decree could operate. But the court, having then considered the cases upon the subject, granted the application.

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MASTER OF THE ROLLS.—In *Otway v. Nestor*, the cases were relied on, which Mr. *Smith* has cited on this motion, and also, I think, the Emperor of Russia's case in Russell and Mylne's Reports. I shall look at my note of the application in *Otway v. Nestor*, and make my order in this case to-morrow.

*Thursday, January 31st.*

HIS HONOR, having referred to the application in this case, said :—

The question now before the court was very fully considered in *Otway v. Nestor*. The present application is *a fortiori* : for in *Otway v. Nestor*, the allocating order reserved the sum of £60 for the post costs ; but that sum proving insufficient, the plaintiff made his application, in effect similar to the present. I had then to consider the cases cited by Mr. *Smith* upon this motion, and also the case of *Greig v. Somerville (a)*, in which the Emperor of Russia was a party. Considering those cases, I felt bound to grant the application in *Otway v. Nestor*, and *a fortiori* I must grant the present application.

Order.—Refer it to the Master to tax the plaintiff's post costs as desired ; and let the amount be paid out of the sum allowed to Bridget Fitzpatrick, by the Master's report of, &c.—the residue to be paid to J. Fitzpatrick. No costs of this motion. The fee of Ten Guineas for the purchaser's counsel not to be allowed in the post costs ; and let this order be without prejudice to the reference for prolixity on affidavits, now pending.

(a) 1 Russ & Myl. 338.

*Tuesday, February 19th.*

**MISTAKE—APPLICATION, NOTWITHSTANDING FINAL DECREE.**


**HACKETT v. DONNELLY, Administrator of MARLAY.**

On the 19th of June last, Mr. *W. Brooke, Q.C.*, with whom was Mr. *Latouche*, on behalf of *Isabella Digges Latouche* and *George Digges Latouche*, surviving executors of *James Digges Latouche*, deceased, moved that the Accountant-General might, out of the sum of £2,967 7s. 1d., old 3½ per cent. stock, then in bank to the credit of this cause, transfer to the said executors so much of the said stock as would be equivalent to the sum of £590. 3s. 1d., being for five years, eleven months, and three days' interest from the 11th of May, 1818, to the 14th of April, 1824, on the principal sum of £1800, late currency, due by the late Major-General Thomas Marlay to the said *James Digges Latouche*; or, otherwise, that the said executors might be at liberty to file a charge for same, as creditors of the said *Thomas Marlay, &c. &c.* Upon debate of that motion, the court ordered that the said surviving executors be at liberty to file a charge under the decree in this cause, in the Master's office, claiming the said sum of £590. 3s. 1d., as arrears of interest on the said sum of £1800, and proceed to procure and file a separate report thereon, on or before the 20th day of November then next ensuing; or, in default thereof, that the said order should stand discharged.

In pursuance of the foregoing order, the said executors having duly filed their charge, and the plaintiff having filed a discharge thereto, and the matters thereof having been discussed before the Master, he reported as follows:—"I find that, by indented deed of assignment, bearing date the 11th of May, 1818, between Lieutenant-Colonel Thomas Marlay, then of, &c., since deceased, of the first part; *George Latouche & Co.*, of, &c., bankers, of the second part; and *James Digges Latouche*, of Sans Souci, county of Dublin, also since deceased, of the third part, whereby, after reciting that the said *Thomas Marlay* was entitled to a sum of £3,600, late currency, being the residue of a certain charge affecting certain lands therein mentioned, (and which charge, I find, was only to bear interest from the day of the decease of *Dame Elizabeth Piers Marlay*, who afterwards departed this life on the 14th of April, 1824); and further reciting, that the said *Thomas Marlay* then stood indebted to the said *George Latouche and Co.* in the sum of £1800, he, the said *Thomas Marlay* granted and assigned unto the said *James Digges Latouche*, his

Where, in a former suit, L. filed a charge, claiming the principal sum of £1800, with interest thereon at 6 per cent. from the 11th May, 1818, and the defendant T. M., the debtor, filed a discharge thereto, admitting the debt, and that the same was due, with interest at 6 per cent from 11th May, 1818; but by a mistake in the Master's report, it appeared that the interest due on the said principal sum of £1800, was only from the 24th of April, 1824; and the account having been taken and the report made, without controversy, the mistake was unobserved, and the final decree followed the report. L. accordingly received thereunder the said principal sum of £1800, with interest thereon, from 24th April, 1824,

Afterwards, when several years had elapsed from the date of the final decree, and the residue of the fund in the cause had been transferred to the present, (which is a suit for administering T. M.'s assets. L. having discovered the mistake in the report of the Master in the former cause, applied in this cause to be paid the amount of the interest at 6 per cent. on the said principal sum of £1800, from the 11th May, 1818, to the 24th April, 1824, out of the fund so transferred to the credit of this cause—*Held*, that L. was so entitled, and should be paid accordingly.

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"executors, administrators, and assigns, the said principal sum of  
 "£3,600, and all interest to grow due thereon, upon trust, in the first  
 "place, to pay over to the said George Latouche and Co. the said sum of  
 "£1800, together with interest thereon, at the rate of 6 per cent. per  
 "annum, from the date of said deed, until the same should be paid, with  
 "all costs, charges, and expenses, as therein mentioned; and after pay-  
 "ment of said sum of £1800, together with the interest thereon, and  
 "all such costs as should be incurred for the recovery thereof, then upon  
 "trust, to pay over the remainder of the said principal sum of £3,600  
 "to the said Thomas Marlay, his executors, administrators, or assigns.  
 "I further find, that in order to secure the re-payment of said sum of  
 "£18,00, the said Thomas Marlay executed his bond to the said James  
 "Digges Latouche, for the sum of £3,600, conditioned for the payment  
 "of the said sum of £1800, with warrant of attorney for confessing  
 "judgment thereon, and that judgment was entered on said bond in the  
 "Court of Exchequer, &c., as of Easter Term, 1818; and that the said  
 "bond is stated in the said deed of assignment to be a collateral secu-  
 "rity with said charge. I further find that, in or about the year 1825,  
 "a bill was filed in this court, in a cause wherein Frederick Piers was  
 "plaintiff, and the said James Digges Latouche and others were defend-  
 "ants, praying, amongst other things, an account of the sums due to the  
 "plaintiff, and to the defendants therein named, for principal and inte-  
 "rest, on foot of certain deeds of appointment, in the pleadings men-  
 "tioned, including the said charge of £3,600, so assigned to said  
 "James Digges Latouche, to whom the same were due and owing re-  
 "spectively; and I find that the said James Digges Latouche having  
 "departed this life in or about the month of December, 1826, said cause  
 "was revived, and the said executors of the said James Digges Latouche,  
 "deceased, were made parties thereto, as such executors; and that, after  
 "several proceedings in the said cause, a decree to account was pro-  
 "nounced on the 25th of June, 1829. I further find, that the Master  
 "in the said cause, by his report in said cause, bearing date the 6th of  
 "August, 1833, reported that there was due to the executors of the said  
 "James Digges Latouche, on foot of the deeds in the pleadings men-  
 "tioned, bearing date the 15th September, 1799, (the deed creating the  
 "charge) and the 11th May, 1818, the principal sum of £1,661. 10s. 9d.  
 "(and which, I find was a moiety of said charge of £3,600, late currency)  
 "with interest thereon from the 24th of April, 1824 (being the day of  
 "the death of Dame Elizabeth Piers); and also reported, that a like  
 "sum of £1661. 10s. 9d. (which I find was the other moiety of the  
 "said charge of £3,600, late currency) together with interest, as last men-  
 "tioned, was due to Theo. B. Donnelly, as administrator of said Tho-  
 "mas Marlay. I further find, that by the final decree pronounced in  
 "said cause of *Piers v. Piers*, it was decreed that the said executors were

"entitled, for principal and interest, on foot of the said deeds of 15th September, 1799, and 11th of May, 1818, to the sum of £2664. 14s. 4d., and that there was due to the defendant, Theo. B. Donnelly, administrator of Thomas Marlay, on foot of the deed of the 15th of September, 1799, the like sum of £2664. 14s. 4d. I further find, that certain parts of the lands and premises, in the said cause of *Piers v. Piers*, were sold under said decree; and that the money arising from such sale was brought into court to the credit of said cause; and I find, that the said Isabella D. Latouche and George D. Latouche, as such executors of the said James Digges Latouche, were paid, out of said fund, the whole amount of the said sum of £2664. 14s. 4d., decreed due to them as aforesaid, together with the interest that accrued due thereon from the date of the said decree; and I find, that afterwards, by an order made in the said cause, bearing date the 28th of February, 1838, the said sum of £2664. 14s. 4d., so decreed as aforesaid, to the said Theo. B. Donnelly, as administrator of the said Thomas Marlay, together with the other interest that accrued due thereon, from the date of the said decree, was transferred from the said cause of *Piers v. Piers* to this cause, which, I find, is a suit for administering the assets of the said Thomas Marlay. I further find, that no part of the interest on said sum of £1800, the principal money so lent and advanced by said George Latouche and Co. to the said Thomas Marlay, and which accrued due between the 11th day of May, 1818, and the 24th day of April, 1824, when said charge of £3,600 first bore interest, was ever paid to the said James D. Latouche, or to his executors, or to the said George Latouche and Co."

"I further find, that in case the court shall be of opinion that the said report and decree in the cause of *Piers v. Piers*, and the statute of limitations, do not stand in the way of the said executors of said James D. Latouche with respect to said charge, that there is still due and owing, to the said executors, the said sum of £590. 3s. 1d. I further find that the said judgment confessed by the said Thomas Marlay, to the said James D. Latouche, in the penal sum of £3600, and which I find was collateral with said charge of £3600 for the repayment of said loan of £1800 and interest thereon, was not proved in the said cause of *Piers v. Piers*; and I find, that in case the court shall be of opinion that the said decree in the said cause of *Piers v. Piers*, and the lapse of time do not bar the claim of the said executors with respect to the said judgment, a sum of £329. 14s. 3d., being the difference between the sum received by the said executors, and the amount of the said judgment, is still due and owing to said executors on foot of said judgment, and to be paid to them out of the assets of Thos. Marlay, on account of said sum of £590. 3s. 1d.—all which, &c."

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Mr. *Latouche*, with whom was Mr. *Wm. Brooke*, Q.C., now moved that the court might take into consideration the special points reserved by the foregoing report; and that the said executors of the said James Digges *Latouche* might be declared entitled, out of the funds in court to the credit of this cause, to be paid the sum of £590. 3s. 1d. sterling, or the sum of £329. 14s. 3d. sterling, as to the court should seem fit; and accordingly, that the Accountant-General might transfer, &c. &c. The present application was grounded on the Master's report, and also on the affidavit made for the purpose of the former application by the solicitor for the executors of the said J. D. *Latouche*.

The affidavit just mentioned fully stated the proceedings in the cause of *Piers v. Piers*; and that, in their answer and subsequent charge filed in that cause, the executors of the said J. D. *Latouche* claimed the principal sum of £1,800, with interest thereon, from the 11th of May, 1818. That to the said charge were annexed two schedules shewing the particulars of demand. That General Marlay also filed a charge, stating that the charge for £3600, had been assigned by him to the said J. D. *Latouche*, with the interest to accrue due thereon at six per cent, from the day of the death of Dame Elizabeth *Piers*, viz., the 24th of April, 1824, in trust, to repay the sum of £1800, advanced by *Latouche* and Co., with six per cent thereon, from the 11th of May, 1818, the date of the assignment; and further stating, that there was due to the executors of the said J. D. *Latouche*, in trust for *Latouche* and Co., the said principal sum of £1800, late currency, being £1661. 10s. 9d. British, with interest thereon, at six per cent, from the 11th of May, 1818, to the 28th of June, 1830, the day of filing the said charge, amounting to the sum of £1167. 14s. 4d., making together the sum of £2829. 5s. 1d. That to the charges of General Marlay, and the executors of J. D. *Latouche*, the defendant Sir J. B. *Piers* filed discharges, fully admitting the said charges; and that the said charges and discharges having been fully admitted in the Master's office, and no question having arisen as to the right of the executors of the said J. D. *Latouche*, to the interest on the said sum of £1800, from 11th of May, 1818, the said executors and their solicitor took it for granted that the Master's report was according to the said charges and discharges, and no objection was made thereto.—That the mistake was not discovered until lately; and that, as there was no controversy as to the rights of the executors of J. D. *Latouche*, the mistake in the Master's report probably arose from the fact that the judgment confessed as a collateral security with the assignment of the charge, was for the same amount as the charge; and that it was stated in the deed of assignment, and pleadings, &c., that the charge was to bear interest only from the day of the death of Dame Elizabeth *Piers*, which was the 24th of April, 1824.

Counsel submitted that, under the circumstances detailed in the foregoing report and affidavit, the mistake in the report of the Master, in the cause of *Piers v. Piers*, was plain. The sum reported due to the executors of J. D. Latouche should have included the amount of the interest on the loan, from the 11th of May, 1818, to the 24th of April, 1824; and, had the mistake been discovered before the fund was transferred from *Piers v. Piers* to this cause, the court, upon an application shewing the mistake in that cause, would, as of course, have rectified the error, and done the complete justice which it intended. Upon the present application, the only question arises from the transfer of the fund from the cause in which the mistake occurred; but though transferred, the fund is still in court; and the present application closely resembles that of a prior creditor provided for by the decree, coming in for payment of his demand, after an order, allocating the entire fund, but before the fund was actually paid out. In such case, the court would order the prior creditor to be paid out of the fund, notwithstanding the previous allocation.\* *Balf v. Flanagan* (a); *Gillespie v. Alexander* (b); *Greig v. Somerville* (c); *Lashley v. Hogg* (d); *Angel v. Haddon* (e). This cause was instituted for the administration of General Marlay's assets, against Donnelly, who is Marlay's representative, and the residuary legatee under his will. The fund transferred to the credit of this cause is what remained of the said charge of £3,600, and the interest thereon, after payment of the sum reported and decreed to the executors of J. D. Latouche in *Piers v. Piers*. Marlay or his representative was not entitled to any portion of that charge, or of the interest which accrued due upon it, except what should remain after the executors of J. D. Latouche were fully paid. After the charge filed by Marlay in the cause of *Piers v. Piers*, he certainly could not say, that the executors of J. D. Latouche have been fully paid, nor be allowed to object to the present application; and the objection cannot have greater effect when it comes from his representative and residuary legatee.

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Mr. Henry Martley, for the plaintiff Hackett, and Mr. Monahan, for Donnelly, resisted the present application, which, though they would not question as to its being perfectly *bonâ fide*, they said, should not be granted after the report, final decree, and payment in the cause of *Piers v. Piers*, and the acquiescence of the parties for several years. That the present was, in effect, a summary application, seeking to reverse the final decree in another cause, by which the claims of the present applicants were ascertained, decreed and paid without objection; and that as to the alleged mistake in the Master's report, in the cause of *Piers v.*

\* See *Birch v. Alt*, the preceding case.

(a) 2 Mol. 252.

(b) 3 Russ. 136.

(c) 1 Russ. & Myl. 358.

(d) 11 Ves. 602.

(e) 1 Mad. 529.

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*Piers*, the court could not say, after the lapse of several years without objection, what were the reasons which directed the framing of it, nor that any mistake actually occurred. But, even though the court should now feel convinced that, by an accidental mistake in the Master's report, in the cause of *Piers v. Piers*, the executors of J. D. Latouche were not decreed, nor paid the entire amount really due to them; still, the final decree in that cause must stand in the way of the present application.

MASTER OF THE ROLLS. It is quite clear that, by mistake, the sum now sought was not reported due to the executors of J. D. Latouche, in the cause of *Piers v. Piers*, and that it is still due to them. I shall, therefore, be glad to grant the present application, if in my power. If the relief sought can be granted at all, it may, I think, be granted now. The applicants have filed a charge in this cause; all the necessary parties are before the court, and the court is fully apprised of the facts. Under such circumstances, I do not see the magic of a bill that I should put the parties to the inconvenience of a plenary suit, before the court can administer justice in the case. The only doubt on my mind is, that I can now interfere with the final decree in *Piers v. Piers*, which was obtained in mistake, but without fraud. The case of *Manaton v. Molesworth*, in Eden's Reports (a), shews, that where there was a report, containing a misallowance obtained by fraud, the final decree, which followed the report, did not prevent the court afterwards, when the misallowance was discovered, doing what justice required, though inconsistent with the terms of the decree. If I remember rightly, the language of the court, (the Lord Keeper Northington), in that case, is very strong. I shall consider the application, and, if I can, make my order in a few days.

Wednesday, February 20th.

MASTER OF THE ROLLS.—I am of opinion that the executors of J. D. Latouche are entitled to be paid the full amount of the interest on the loan of £1800 to General Marlay, from the 11th of May, 1818, to the 24th of April, 1824, out of the fund in court to the credit of this cause. The case of *Manaton v. Molesworth*, and especially the case of *Williams v. Jones* (b), I think, satisfactorily remove the objection which I was at first disposed to fear would stand in the way. In the latter case, though the motion to alter the final decree was refused, it was because it did not appear that it would be ultimate justice to grant the application. But the Chief Baron Alexander stated, with the concurrence of the

(a) 1 Eden, 18.

(b) M'Clell. 96.

rest of the court, that although it is not the ordinary practice to alter a final decree on motion, yet such is often done, where the ultimate justice requires it.

**Order.**—His Honor doth declare, that it is against right and conscience that the said Thomas Marlay or his representatives should receive the said sum, which was so admitted by him to be due to the executors of the said J. D. Latouche, and that the same, being now under the control of this court, ought to be paid to the surviving executors of the said J. D. Latouche, instead of being distributed amongst the legatees of the said Thomas Marlay; and, accordingly, the Court doth order, that out of the fund standing to the credit of this cause, the said Isabella Digges Latouche and George Digges Latouche, as such surviving executors, be paid the sum of £590. 3s. 1d., in the report of Master Goold, dated the 4th day of February instant, found to be due to them for interest, which accrued due on the sum £1800, from the 11th of May, 1818, to the 24th of April, 1824, and accordingly, it is ordered, that the Accountant-General of this court do transfer to the said executors, or their attorney, &c.

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Friday, January 25th, 1839.

PLEADING—PARTIES—DEVISE.

The Marquis of ORMONDE v. CHARLES B. WANDESFORDE, JOHN B. WANDESFORDE, HENRY T. B. WANDESFORDE, WALTER B. WANDESFORDE, and others.

The Earl of W., in 1772, devised and bequeathed to S. E. T. and W., and the survivor and his heirs, all his real and personal estate, upon trust, to apply his personal estate, so far as it would go, in payment of his debts, the remainder unpaid, to be charged upon his real estates; then upon trust, to pay an annuity of £800 to his wife, who was to have certain parts of the personal estate, *except his plate and family pictures*, which he desired should go to his grandson, the second son of his daughter Lady A., taking the name and arms of W., as thereafter mentioned. After paying said annuity, to permit Lady A. to take to her separate use, out of the rents, &c. an annuity of £800. The residue and savings of the rents to be applied in payment of his debts; and after the decease of Lady A., leaving issue as thereafter mentioned, then in trust, and subject to said debts, to permit the second son of J. B., begotten on Lady A. taking the name and arms of W., and the heirs male of his body, to receive the same in preference to her eldest son; it being testator's intent and meaning that such second son "do take and be preferred, &c. until he shall become an eldest son, and so shall each and every second or younger son or sons take, place, and enjoy the said estates according to seniority, &c., and the heirs male of the body of such second son." Maintenance was provided for such second son from the time of his birth, during his minority, and from thence an annuity of £800 during the life of Lady A. If there should not be such second son, testator provided a similar allowance for the eldest son of Lady A., by any aftertaken husband; and for want of such eldest son, then such allowance for the eldest son of J. B. and Lady A. The residue of the rents to be applied until such second or eldest son should attain 21, in discharge of incumbrances. In default of such issue, the said estates, and the whole savings thereof (except as aforesaid), to the use of the daughters of Lady A., as tenants in common in tail, with remainder to the separate use of Lady A. for life, with power to dispose of the rents of said estates and all the savings thereof; with ultimate remainder to his trustee W. T. and his heirs for ever.

At the date of the will and of testator's death, the O. estates stood limited to J. B., afterwards Earl of O. for life, with remainder to his first and other sons in tail male.

Testator survived his wife, and died in 1784, leaving Lady A. his only child. She had issue four sons by J. B., Walter, John, James, and Charles, all of whom had been born during the testator's lifetime, and John was second son at the date of the will, and of testator's death.

In 1793, John joined his father and mother in a recovery of the W. estates, and executed a deed, declaring the uses thereof, to Lady A. for life; remainder to John for life; remainder to John's sons in tail, with successive remainders to James and Charles for life, and their issue respectively in tail male; and said deed contained a proviso for shifting the W. estates from John to James, and from James to Charles, in the event of the O. estates coming to John or James.

In 1798, John died. J. B. Earl of O. died 1795, whereupon Walter became entitled, and suffered recoveries of the O. estates, and died in 1822. James then became Marquis of O., and acquired an interest in the O. estates, under Walter's will.

Lady A. died in 1830; and in 1834, James, then Marquis of O., filed his bill against Charles and the present plaintiff, and the heir of the surviving trustee, whereby he claimed the W. estates, as tenant in tail under the will of 1772, or as tenant for life with remainder to his eldest son in tail male under the deed of 1793. Charles answered the bill, and issue had been joined, and publication passed, when the plaintiff James, Marquis of O., died.

In 1838, the present plaintiff filed his bill against Charles and his three sons, setting out all the charges contained in the former bill, and the several proceedings had thereon, and claiming to be entitled to the W. estates, either as issue in tail under the will of 1772, or as tenant in tail under the deed of 1793, and the recoveries. The bill stated that Charles and his sons claimed some interest in the said estates, and in the subject matter of this suit, and in that respect were necessary parties. The bill prayed that plaintiff might have the benefit of the said several former proceedings, proofs, &c.; and that the trusts of the will might be carried into execution, and for the usual accounts, &c.; and that his rights might be ascertained, &c.

demurrer; and by Messrs. *Hawkins, Keatinge, Q. C., Warren, Q. C., Jan. 1839.*  
*Sir Thomas Staples, Q. C., Sergeant Greene, and the Attorney-General* (now Mr. Justice Ball), for the bill. The pleadings and will, upon which the several questions arose, are stated at length in the following judgment, as also most of the arguments, and of the leading authorities referred to by the counsel upon the several points determined in this case. Some of the authorities cited at the bar, and not particularly mentioned by the court, are collected in the foot-notes. The Editor begs to add, that this case now appears a little out of its regular order, as it was believed that it would be most convenient to the profession to have the earliest publication of cases likely to be of more frequent application in ordinary practice.]

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The MASTER OF THE ROLLS now delivered the following judgment:—

The bill, which was filed by the Marquis of Ormonde in the year 1838, states, that his father, the late Marquis of Ormonde, on the 2nd of August, 1834, filed his bill in this court against Charles Butler, calling himself Charles Wandesforde, and against the plaintiff, then the Earl of Ossory, and the Earl of Erne; and thereby stated, *as the plaintiff now charges*, that John Earl of Wandesford was well and sufficiently seized of, or otherwise entitled to, certain estates in Kilkenny and elsewhere in Ireland, and Yorkshire in England, commonly known as the Wandesforde estates; and that he had, at the time of making his will, and of his death, only one child, Lady Anne, who married John But-

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To this bill the three sons of Charles demurred, for want of equity. No special grounds were assigned on the record. At the bar, the causes of demurrer assigned were:—

1st. That this being in the nature of a supplemental suit, could not be maintained against these defendants, who were not parties to the original suit, nor deriving under a party to that suit:—*Held*, that this ground of demurrer was too wide, and should have been confined to that part of the bill and its prayer which sought the benefit of the former proceedings.

2nd. That if the plaintiff's title be under the will, these defendants are not necessary parties:—*Held*, that the statement of the plaintiff's claims, under the recoveries and deed of 1793, justified him in making these defendants parties.

3rd. That the two younger sons of Charles were remote remainder-men under the deed of 1793, and that the charge of interest in the bill must be referred to *that interest* which was not sufficient to justify their being made defendants:—*Held*, that as the plaintiff shewed, under the shifting clause of the deed of 1793, some interest in all the defendants, the general statement, that they claim some interest, must be referred to *that interest*. But *semble*, a general allegation, that defendants claim *some interest*, without shewing how, or in what manner, insufficient.

4th. That the plaintiff shewed no title to the W. estates:—*Held*, that Lady A. took no estate under the will; that the devise to the second son of Lady A., and the heirs male of his body, was an *executory devise* to such son as should answer that description at the time of the death of Lady A.; and therefore, that the recoveries suffered in 1793 and 1795, were bad, for want of a tenant to the *precipe*, and a person capable of being vouched, so as to bar the remainders limited by the will; assuming, that on the death of John, James, late Marquis of O., took an estate tail by way of *executory devise*, yet, on his becoming eldest son, the W. estates shifted to his next brother, under the clause in the will.

That the limitation to the trustees and the survivor and his heirs, vested in them the legal estate in fee.

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ler, afterwards Earl of Ormonde and Ossory (the father of the late, and grandfather of the present plaintiff); upon whose marriage the Ormonde estates were settled, and at the time of making the will stood limited to the use of the said John Butler for life, with remainder to his first and other sons successively in tail male. That, on the 28th of November 1772, the testator being so seized made his will, the provisions of which I shall presently state.\*

*Issue of Lady A. by John Butler,—Walter, John, Jas., Charles, and Elizabeth.*

*John, second son at the date of the will, and of testator's death.*

*Several of the Earl of W.'s debts charged on his estates still unpaid.*

*Recoveries of the W. Estates suffered by John and his father and mother in 1793 & 1795.*

*Deed leading the uses, dated 9th Nov. 1793.*

*Uses of the recoveries of the W. Estates.*

That his wife died in 1781, and he died in 1784; Lady Anne being his only child then, and at the time of making his will. That she had issue by John Butler four sons, Walter, John, James and Charles, and two daughters, Elizabeth married to Thomas Kavanagh, and Eleanor now Lady Eleanor Butler, all of whom, except Lady Eleanor, were born in the testator's lifetime. That John was the second son at the date of the will and of the death of the testator. That previous to the year 1793, three of the trustees named in the will died, leaving the Earl of Erne the surviving trustee. That several debts of the Earl of Wandesforde, charged by his will on his Kilkenny and Yorkshire estates, still remain unpaid, and among others, a debt of £17,500, secured by a mortgage of the Kilkenny and Yorkshire estates, dated the 29th of September, 1772, originally due to the Duke of Northumberland and now vested in the Earl of Beverly; and that there are other debts secured by mortgage still unpaid.

That John, the second son, having, after the death of the Earl of Wandesforde, attained his age of 21 years, and claiming a vested remainder in tail, did, together with his father and mother, suffer a recovery in Michaelmas Term 1793 of the Irish estates, and in 1795 of the estate in Yorkshire; and that, previous to the suffering of these recoveries, a deed, bearing date the 9th November 1793, was executed between John Butler, Earl of Ormonde, and Anne his wife, and John Butler their second son, of the first part, Thomas Kemmis of the second part, and John Kingsbury of the third part; and that by this deed, the Earl and his wife and son conveyed the Kilkenny estates, to the intent that he should become tenant to the precipe, so that a valid recovery might be suffered; and that it was declared that such recovery should enure to the uses declared by another deed intended to be executed. That, by a deed dated the 4th of April, 1795, the Earl of Ormonde, his wife and second son conveyed the Yorkshire estate to Michael Bray, to hold to him, to the intent that by this deed, and a fine *sur cognizance* intended to be levied, he might become tenant to the freehold, in order that a valid recovery might be suffered to enure to the uses declared by the deed before referred to. That by this deed, which is dated the 9th November, 1793, in order to provide a maintenance for John, during his mother's

\* The will is stated at length, p. 248, *post*, after the decision upon the objections to the pleadings.

life, and for settling the estates, they were conveyed to the Earls of Keniskillen and Erne to the use of trustees for 99 years, to secure £1,500 per annum for John Butler, during the joint lives of himself and his mother, and subject thereto, to the use of Lady Anne for life; remainder to John for life; remainder to his first and every other son in tail male; remainder to James the late Marquis, for life; remainder to his first and every other son in tail male; remainder to the defendant Charles Butler (Wandesforde) for life; remainder to his first and every other son in tail male; remainder to Walter the eldest son for life; remainder to his first and every other son in tail mail; and that it was declared, that John, James (the late plaintiff), and Charles should have certain powers, therein mentioned, of charging the estates with jointures and provisions for younger children; and that if John or any of his issue male should become seized and possessed of, and entitled to the estates whereof the Earl of Ormonde was then seized, *or of so much thereof as should not be sold for payment of debts or other family purposes*, then the said manors, &c., should, immediately upon the said Ormonde estates coming to John or his issue male, go over to, and vest in said James Butler and his sons in tail male; and after his death without issue male, in Charles and his sons in tail male; and after his death without issue male, in the fifth and every other younger son of John and Anne Butler, successively, in tail male before John the second son, his issue male, or any of them should have or be entitled to take or enjoy the same, and that freed and discharged from every charge which should be made by virtue of said deed, save only such leases as should have been made thereof according to a leasing power therein, before mentioned. That the deed contained a similar clause, providing that the Wandesforde estate should go over to Charles and his sons in tail male, in case James or any of his issue male should become seized or possessed of the Ormonde estate, *or so much thereof as should not be sold for payment of debts or other family purposes*, in like manner freed and discharged from all incumbrances created under the power save as aforesaid.

That John, the second son of Lady Anne and John Butler, died on the 15th of April, 1796, unmarried and without issue, and on the 15th of December, 1795, John Butler Earl of Ormonde died, whereupon his eldest son, Walter, became entitled to the Ormonde estate as tenant in tail, and in 1805 suffered recoveries and acquired the fee.

That on the death of John, the second son, the late Marquis, James, became entitled to the Wandesforde estates, as tenant in tail under the will, or tenant for life under the deed of 1793, expectant on the death of his mother; and that plaintiff is his eldest son. That Earl Walter was created Marquis of Ormonde, and by reason of his intermarriage with Miss Clarke, who died in 1817, became seized of various estates in England. That on the 28th of February, 1820, Walter, Marquis of

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*Shifting  
clause.*

*Death of John  
the second son,  
without issue,  
15 April, 1796.*

*Walter seized  
in fee of the O.  
Estates.— On  
death of John,  
James entitled  
to W. estates.*

*Walter's will.*

*The O. estates  
vested in trust-  
ees for pay-  
ment of debts.*

*Residue to be  
settled to the  
use of the late  
Marquis for  
life; remain-  
der to plaintiff  
for life; re-  
mainder over.*

*Sale of parts  
of the ancient  
O. Estates in  
Walter's life-  
time.  
Debts upon  
them created  
by Walter.*

*Value of the  
ancient O. es-  
tates at the  
time of Wal-  
ter's death :—  
inadequacy  
thereof to pay  
the amount of  
debt.  
James the late  
Marquis not  
entitled under  
the old entail,  
but merely as  
the devisee of  
Walter, and  
never took any  
beneficial in-  
terest in the ancient O. estates.*

Ormonde, made a will relating to his Irish estates, whereby, after reciting a deed of 1808, by which he vested his said estates in trustees, for payment of his then debts, and that several of those debts remained unpaid, he confirmed that deed, and gave several legacies and annuities, which he charged on his Irish estates; and directed his trustees, after satisfying the trusts of that deed, to raise, by sale or mortgage, a sum sufficient to redeem certain annuities, if they thought it right, and to pay all his debts and the legacies given by his will; *and directed them to settle any unsold portion of the estates to the use of the late Marquis for life, remainder to plaintiff for life; with remainders over.* That he made a will of the same date, relating to his English estates, by which he devised them to trustees, to the use, as to part thereof, of the defendant Charles Wandesforde; remainder to his first and other sons, freed from all charges except a sum of £10,000; and, as to the residue, to the use of the late Marquis for life; remainder to plaintiff for life, subject to all the debts, save the above mentioned £10,000; with power to the late Marquis to charge £10,000, and also a jointure of £1500 per annum. That a leasing power for 21 years was given to the late Marquis, and every other tenant for life; and that plaintiff got power to charge a jointure to the extent of £1500 per annum, and £10,000 for younger children's portions. That Walter, Marquis of Ormonde, died on the 10th of August 1820, when the late Marquis succeeded to the title. That various portions of the Irish Ormonde estate, and which formed part thereof when the deed of 1793 was executed, were sold in the life-time of Walter, and the produce exceeding £370,000 applied to pay debts. But that, at his death there remained, independent of legacies, debts affecting the Irish estates, to the amount of £400,000, a great part of which had been created by him, besides irredeemable annuities to the extent of £2315, which were charged on the Irish estates alone. That there were debts to the amount of £133,061, affecting the English estates; and that some of these debts, by virtue of the will became charged on the Irish estates. In addition to which, his bond and simple contract debts, also charged on the Irish estates, amounted to £45,708. That the Irish estates, at the death of Walter, did not produce more than £16,000 Irish per annum, and while the late Marquis held them, only produced £12,000, except in one year, and if they had been brought to a sale, at any time since the death of the said Walter, would not have produced more than £300,000, which would be quite inadequate to pay the debts. That in no event could the plaintiff or his father take the Irish estates under the limitations subsisting in the year 1793, or when the Earl of Wandesforde made his will, but only as the devisee of Walter, and from his bounty; and that the only beneficial interest he took was as devisee of the English estates.

That after the death of Walter, Charles filed a bill in England in his own name and that of his two sons, to have the trusts of said Walter's will carried into execution, and the estates in Ireland sold to pay the debts; and, it being evident that if this suit was prosecuted, the whole of the Irish estates must be sold, the late Marquis, with the concurrence of the defendant Charles Wandesforde, procured an act of parliament by which the trustees were empowered to sell the estates in England, for the purpose of paying all the incumbrances affecting them, and the Irish estates. That the trustees accordingly sold the English estates, and out of the produce, £435,360 have been paid in discharge of debts affecting the Irish estates, and £20,000 applied to redeem annuities affecting them. That there are still debts affecting the Irish estates, to the amount of £6,719, and annuities created by Walter, to the extent of £1,500; although, since the filing of the bill by the late plaintiff, another portion of the English estates has been sold, and £13,000 of the produce applied to redeem annuities on the Irish estates, *and by these means more than the value of the Irish estates has been paid in discharging debts affecting them, over and above the charges and incumbrances which affected them on the 9th of November, 1793.* That plaintiff's powers, with respect to the residue of the estate, are less extensive than those which he derived under the will: the act of parliament having abridged them. That the late plaintiff was obliged to raise for his support the £10,000 which he had power to charge.

That according to the true construction of the will of the Earl of Wandesforde, the devise to the second son of Lady Anne should be held to be a devise to such person as should be next son after the eldest son, and should not have succeeded to the *ancient* Ormonde estate under the settlement and entail, which then subsisted, of those estates; and consequently, that plaintiff's father became entitled to an estate in tail male on the death of John the second son, without issue; and that if such be not the true construction, then that the late plaintiff was entitled, under the deed of 1793, to an equitable estate tail, or to an estate for his life with remainder to his eldest son in tail. That plaintiff's father, or plaintiff, never became possessed of, nor entitled, by descent or old entail to any estate whereof John Earl of Ormonde was seized, within the intent and meaning of the deed of 1793, or of the will of the Earl of Wandesforde; and that plaintiff takes merely an estate for life as the purchaser thereof; and the whole of the Irish estates must be considered as having been sold and purchased by the produce of the English estate.

That Anne, Countess of Ormonde (*i. e.* Lady Anne), died on the 3d of April, 1830, whereupon, Charles entered upon the Kilkenny and Yorkshire Wandesforde estates, as the second son of John Butler and Lady Anne, living at her death, and has suffered recoveries thereof or of part thereof, claiming as tenant in tail; and plaintiff insists that he

*Lady A. at her death;—recoveries suffered by him.*

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*More than the value of the ancient O. estates paid in discharging the debts upon them over and above the charges which affected them on 9th Nov. 1793.*

*The construction of the Earl of W.'s will, insisted on by plaintiff*

*Death of Lady A. 3d April, 1830: whereupon, possession of the W. estates, taken by Charles, as second son of*

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hearing of the cause, be declared to be entitled to the whole of the relief prayed by him; and, as against the defendants who have demurred, he would not be entitled to the benefit of the proceedings in the former suit. But if the defendants meant to rely on this objection, they should have confined their demurrers to that part of the relief, and cannot, in my opinion, by demurrers framed as the present pleadings are, put the plaintiff out of court, merely because he asked more than he is entitled to, if he is entitled to part of the relief sought by him.

2. It is also insisted on the part of the three defendants who have demurred, that if the plaintiff's case is founded on the limitations in the will of the Earl of Wandesforde, they are not necessary parties; because, under that will there is an estate tail, either in the plaintiff or in the father of the defendants. It is also said, on behalf of the two younger sons of Charles Wandesforde, that they are not necessary parties, even though the plaintiff's case be founded on the recoveries, and the deed of 9th November 1793; because, under the limitations of that deed, their eldest brother takes an estate tail, and their interest, if any, is too remote to justify the plaintiff in making them defendants; and they add, that the bill does not state with sufficient precision any interest in, or claim of interest by them (a). It is to be observed that the plaintiff does not rest his case solely on the will of the Earl of Wandesforde: he says, that *if the court shall be of opinion that the estates are to be considered as still subject to the limitations of that will, he, as the eldest son of the late Marquis of Ormonde, takes an estate tail in them; but, that if the court shall decide that the recoveries suffered by John Wandesforde put an end to those limitations, he is entitled to the estates under the deed of 1793.* It is contended on his part, that although the defendants, who have demurred, might not have been necessary parties, if the case rested solely on the construction of the will of Lord Wandesforde, and the recoveries had not been suffered, and the deed of 9th of November 1793 executed by John Wandesforde; the recoveries and deed being stated in the bill, shew such an interest or claim of interest in the defendants who have demurred, as rendered it necessary for the plaintiff to make them parties. The words in the shifting clause of the deed of 1793 are particularly relied on for the purpose of shewing that all the sons of Charles Wandesforde are necessary parties. By this clause, as stated in the bill, it is declared, that "in case James (the late Marquis of Ormonde) or any of his issue male should become seized and possessed of any of the estates *whereof John Earl of Ormonde was then seized and possessed, commonly called the Arran, Kilcask and Garry-richen estates or so much thereof as should not be sold for payment of debts or other family purposes*, then and in that case the Wandesforde

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(a) Redes. Pl. p. 188; *Fenton v. Hughes*, 7 Ves. 287.

"estates should, immediately upon the said estates of the Earl of Ormonde coming to James, (the late Marquis), or his issue male as afore-said, go over to, and vest in Charles Butler (now the defendant Charles Wandesforde) *and his sons in tail male*; and, after his death without issue male, to the fifth and every other son of John Lord Ormonde and his wife Lady Anne, in tail male, before James (the late Marquis,) or his issue male should have, or be entitled to take or enjoy the same, free from the powers given to James, and from any charge created by virtue of those powers, except leases made pursuant to a leasing power given by the deed." It is contended on the part of the plaintiff, that this clause does not give an estate tail to the eldest son of Charles; and at all events, that his younger sons have under it such a claim of interest as justifies the plaintiff in making them defendants in this suit.

It will be recollected, that it is always the wish and object of a court of Equity to have before the court all persons interested in the subject, about which it is called upon to pronounce its decree, or, whose rights may be affected by its decision. If any person brought before the court does not claim the interest which the plaintiff alleges he does, the course and practice of the court enable him, by filing a plea or disclaimer, to get rid of the suit, and to obtain payment of any costs he may have incurred by being made a defendant. In the present case, the bill, after stating the recoveries and deed of 1793 with its shifting clause, states, "that Charles Wandesforde and his three sons claim to be respectively entitled to some estate or interest in the Wandesforde estates: and allege that they have an interest in the subject matter of this suit; and that, therefore, they ought, in that respect to be made parties defendant in the suit." This is not, as was argued, the case of a bill containing merely a general charge of interest in the defendant, without stating any fact by which such interest or claim of interest may appear, or on which it may be founded: it sets forth the deed of 1793, which, according to one mode of construction, would give to all the sons of Charles an interest in the estate; and it charges, *and the demurrer admits, that they severally allege they have an interest and ought to be made defendants.* I refer this general charge to that interest or claim of interest previously appearing, and am of opinion, that on this record there is stated such a claim of interest in the sons of Charles Wandesforde, as justified the plaintiff in making them defendants, whether his title rested on the will of the Earl of Wandesforde, or on the recoveries of the deed of the 9th of November 1793.

Being of opinion that the demurrers cannot be sustained on the grounds already mentioned, I proceed to consider, whether the plaintiff has stated such a case as entitles him, against the defendants who have demurred, to any relief in this court. The plaintiff insists that, accord-

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ing to the true construction of Lord Wandesforde's will, John Butler, otherwise Wandesforde, who was the second son of John Butler, afterwards Earl of Ormonde, and Lady Anne his wife, *living at the time of the death of the testator*, took an estate tail in the Wandesforde estates; and that, on his death without issue, if the recoveries suffered by him were invalid, James, the late Marquis of Ormonde and father of the plaintiff, took under the will, as the second son then living, an estate tail in those estates; and that, on the death of the late Marquis, the plaintiff as his eldest son became entitled to a like estate in them. He insists that this is the effect of the will, although his father, by reason of the deaths of John Wandesforde, and Earl Walter, without issue, became the eldest son of Lady Anne and of John Butler. Again; relying on the recoveries and the deed of 1793, he says, that those recoveries were valid; and that, under the limitations of the deed of 1793, his father took an estate for his life; and that he is now entitled to a like estate, or to an estate tail: because, though the deed of 1793 contains a shifting clause, the provisions of that clause do not affect his estate, under the circumstances stated in the bill.

Defendants'  
case.

On the part of the defendants, it is contended, that Charles, being the second son of John Butler and Lady Anne, *living at the death of Lady Anne*, is the person who, according to the true construction of the will, became entitled to the Wandesforde estates; but that, if James took in preference to him, his title ceased when he became the eldest son. It is also contended, on their behalf, that the recoveries suffered by John were inoperative; and, supposing them to be valid, that, under the shifting clause of the deed 1793, Charles, the father of the defendants, is entitled to the estates, the plaintiff and his father having become possessed of the Ormonde estates within the meaning of that clause.

Will of the  
Earl of Wan-  
desforde.

The Earl of Wandesforde's will, which is dated the 28th of November, 1772, is as follows:—It devises and bequeathes to Lords Southwell and Earne, and to William George Talbot and George Vernon, *and to the survivor of them, and the heirs of such survivor*, all his real estates in Yorkshire, in England, and in the counties of Kilkenny, Cork, and Clare, in Ireland, and all his estate and interest in his house and concerns in Cavendish-row, in Dublin, and all his goods and chattels therein, and all his goods and chattels at Castlecomer, except the part thereof specifically bequeathed: to hold his estates and dispose of his effects in trust, in the first place to pay his simple contract debts and legacies, and, after payment thereof, to apply the residue of his personal estate, if any, to discharge his judgment debts or other debts; and so much of his debts as his personal estate would not be sufficient to discharge, to remain a charge on such of his estates thereafter mentioned (*viz.* on his Kilkenny and Yorkshire estates). Then in trust to pay an annuity of £800 per annum to his wife, the Countess of

Provision for  
debts.

Annuity of  
£800 to his  
wife.

Wandesforde, who was to have his houses in Cavendish-row and Castle-comer for her life, with power to her to dispose of the house in Cavendish-row to his daughter, Lady Anne Butler, or to any of her children, as his said wife should think fit; and also with liberty to her to dispose of his stock of horses, &c., absolutely, as she should think proper; except his plate and family pictures, which he desired should go to his grandson, the second son of Lady Anne Butler, taking the name and arms of Wandesforde, as thereafter mentioned; and as to the real estates, after paying the annuity to his widow, in trust, to permit and suffer his daughter, Lady Anne Butler, to receive, take, and be paid yearly out of the rents, issues, and profits thereof, £800 per annum, for her life, for her sole and separate use, notwithstanding her coverture. The residue and savings out of the rents, issues, and profits of the Kilkenny estate to be applied in payment of his English debts and the incumbrances affecting it. And, after the decease of his daughter Lady Anne, leaving issue, as thereafter mentioned, "then in trust, and chargeable with said debts, to permit and suffer the second son of John Butler, begotten on the body of the said Lady Anne Butler, his then wife, taking the surname and arms of Wandesforde, and the heirs male of his body, to receive the same, in preference to her eldest son;" it being his intent and meaning, "that such second son do take and be preferred, as to his said estate, before the eldest son of the said Lady A. Butler, until he shall become an eldest son; and so shall each and every second or younger son or sons take, place, and enjoy the said estates, according to their seniority of age, and priority of birth, and the heirs male of the body of such second or younger son or sons." The will then directs, that such second or other younger son shall have and receive, out of the rents, issues and profits of the Yorkshire and Kilkenny estates, from the time of his birth, during the life of his mother, for and towards his education and maintenance, the annual sum of £200, until he shall arrive at 18 years of age, and from thence the sum of £500 annually, until he shall come to the age of 21 years; afterwards, the sum of £800, until the decease of his mother; "and the residue of the rents, issues, and profits shall, until such younger son shall attain his age of 21 years, be applied in discharge of incumbrances affecting (his) said real estates as afore-mentioned."

And for want of such second issue male or second son of the said Lady A. Butler, then in trust, to permit and suffer the eldest son of the said Lady Anne, by any second or after-taken husband, taking the name and arms of Wandesforde, to receive, take, and enjoy, out of the rents, issues, and profits of his Yorkshire and Kilkenny estates, from the time of his (testator's) decease, during the life of his mother, for and towards his education and maintenance, the annual sum of £200, until he shall arrive at the age of 18, and from thence 500 annually, till 21, and afterwards

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His plate and  
family pic-  
tures.

Annuity of  
£800 to Lady  
A. B.  
The residue,  
and savings,  
&c. to pay  
debts.

Devise to  
the second son  
of J. B. and  
Lady A.

Shifting  
clause.

Maintenance  
for such se-  
cond son from  
his birth.

Disposition of  
residue, &c.

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£800 yearly, until the decease of his said mother. And, for want of such eldest son of any after-taken husband, then in trust, to permit and suffer the eldest son of the said John Butler, begotten on the body of the said Lady Anne Butler, taking the name and arms of Wandesforde, to receive, take, and enjoy, out of the rents, issues, and profits of his said Yorkshire and Kilkenny estates, from the time of testator's decease, during the life of his mother, *for and towards his education and maintenance*, the annual sum of £200, until he should arrive at the age of 18, and from thenceforth the sum of £500 annually, till 21, and afterwards £800, until the decease of his said mother; "And the residue of the rents, issues, and profits shall, until such elder or only son shall attain his age of 21 years, be applied in discharge of the incumbrances affecting my said real estates."

*For want of issue male, then to the daughters of Lady A.*

And, for want of such eldest issue male of the Lady Anne Butler, then in trust, as to the estates in Kilkenny and Yorkshire, and the whole savings thereof, except as aforesaid, to the use of the daughter and daughters of the Lady Anne Butler, as tenants in common, and the heirs of the body of such daughter and daughters.

*For want of such issue to the use of Lady A. for life.*

And, for want of such issue, then to the use of his said daughter Lady Anne Butler, for and during the term of her natural life, without the control of her husband; with liberty, by deed or will, to dispose of the rents, issues, and profits of the said real estates, and all savings arising thereout, after payment of the said debts and other incumbrances, in such manner as she should think fit. And after her decease, then to the use of his said trustee, William John Talbot, taking the surname and arms of Wandesforde, and to his heirs for ever. As to the Cork estates, the trustees were directed to pay any mortgage affecting the same; and, after payment thereof, to permit testator's wife to take the rents, issues and profits for her life, and to dispose thereof, by deed or will, to all or any of his grandchildren, and in default of such grandchildren, to the use of the said William John Talbot and his heirs for ever. The testator also gave to his wife his estate in Clare, to be disposed of as she thought proper.—The will then proceeds:—"And I

*Remainder to Mr. Talbot, and to his heirs for ever.*

*Power to trustees to make leases,*

"hereby empower my said trustees, and the survivor of them, and the heirs of such survivor, to make one or more lease or leases of all and every part of my said estate or estates hereby devised to them, to any person or persons whatsoever, for any term not exceeding three lives or thirty-one years, in possession, and not in reversion; and that at the best and most improved rent, without fine, that can reasonably be had or gotten for the same; perfecting counterparts thereof. And I also empower my said trustees, and the survivor of them, and the heirs of such survivor, to employ proper persons to carry on the work of my collieries regularly, yearly, in the same manner as I now work and manufacture the same, and to apply the money arising thereout, first, in

*and to work the collieries.*

"discharge of my debts, and, after payment thereof, to increase the portions of my younger grandchildren, share and share alike. And I order and direct, that my said trustees, or the survivor of them, or the heirs of such survivor, do have and receive, out of the rents of my estate and income of my colliery, the sum of one shilling in the pound for their trouble and expenses in carrying said trusts into execution; and that they, with the approbation of my said wife, during her life, employ an agent under them, to receive said rent and income of my said collieries, at such poundage or salary as she and they shall think fit."

It is not possible to read this will attentively, without perceiving that it is both inaccurate and deficient. It contains inconsistent clauses, and omits some devises which it was plainly the intention of the testator to insert. For instance, it does not contain any express devise to the eldest son of a second marriage of the Lady Anne; nor to her eldest son by John Butler; though a *maintenance* is provided for each, on the happening of certain events, and, though it is manifest that it was the intention of the testator that they should respectively be devisees of his estates, upon failure of the issue which was to be preferred to them.

The will does not allude to any settlement of the Ormonde estates; but the bill states a settlement of them, subsisting when the will was made. The bill also states, that the testator had then only one child, the Lady Anne Butler, who had issue, born in the testator's lifetime, four sons and one daughter, and another daughter born after his decease; and that John, the second son, was living when the will was made, and was then, and at the time of the death of the testator, the second son of Lady Anne Butler. It has been urged, on the part of the plaintiff, that the devise to the second son of Lady Anne Butler gave to John, who was the second son at the time of the testator's death, a vested remainder in tail, expectant on the decease of his mother. In support of this construction of the will, it is said that the law favors the vesting of estates, and will, if possible, construe the will so as to give vested estates to the devisees;\* and, even though there be no express words calling for that construction, the court may supply them, by a presumption in favor of this doctrine, that it is enough, if a contrary intention does not appear. But, it cannot be contended that this doctrine can be applied

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*Inaccuracy of  
the foregoing  
will.*

*Plaintiff's ar-  
gument upon  
the will con-  
sidered.*

*The law fa-  
vors the vest-  
ing of estates.*

\* An interest, which can be supported as a remainder, shall not be construed an executory devise: *Purefoy v. Rogers*, 2 Saund. 380; *Doe v. Morgan*, 3 T. R. 763; *Doe v. Harris v. Howell*, 10 B. & C. (per Bayley, J.) 197. Where limitation can be held vested, should not be held contingent: *Woodcock v. Duke of Dorset*, 3 B. & C. 569; *Cholmondely v. Meyrick*, 3 B. & C. 253; *Willis v. Willis*, 3 Ves. 51; *Hope v. Lord Clifden*, 6 Ves. 499; *Edwards v. Hammond*, 3 Lev. 132; *Doe v. Moore*, 14 East, 601; *Doe v. Nowell*, 1 M. & S. 327; *Duffield v. Duffield*, 1 Dow. & Cl. 268.

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where the words used in the will shew an intention to the contrary; nor that the court is to hold estates to be vested, because of the *inconvenience* of their being contingent, where the words of the instrument creating them shew clearly the intention that they should be contingent. Much less can it be maintained, that this doctrine is to prevail, when the court cannot, without violating the established rules of law, hold that a limitation confers a vested estate. In the case of *Lord Cholmondeley v. Clinton* (a), the Master of the Rolls calls this doctrine a rule of construction; and, speaking of the case then before him, says:—"The insertion of a single word of future import in the limitation, in addition to the terms 'right heirs,' as the word 'then,' or any similar expression, would, it is admitted, have prevented the remainder vesting in the present right heir, and make it a contingent remainder to the future heir." In the case now before the court, it has not been contended that there is an express devise for life to Lady Anne, antecedent to the limitation to her second son by John Butler; nor has it been insisted that there was vested in the trustees an estate for her life only, on which the remainder to her second son was to depend.

But still it has been argued for the plaintiff, as it was contended in *Driver v. Frank* (b), that by not adopting the construction contended for by the plaintiff, and holding that the will gave a vested remainder in tail to John, the second son living at testator's death, many inconveniences would most probably arise; and that what it is said may be presumed to have been the intention of the testator would in many instances and events be disappointed. For instance, that if all or any of the sons of Lady Anne and John Butler were to die in her lifetime, leaving issue male, such issue male would not take, but the estates would go over to the next son or the daughters, or even the trustee, Mr. Talbot, leaving the issue male of the deceased son or sons unprovided for. No doubt such cases might have arisen; and, had the attention of the testator been so directed, he might have provided for them. But, on the other hand, it may be asked, is there any thing in the will shewing that his attention was not directed to the probability of such an event? Or, that he would have preferred a *great-grandson* to a grandson? He was not in the situation of a parent providing for children altogether dependent on his bounty, and not the objects of the care of others; he was selecting a person who was to represent his estate, assume his name and arms, and, as far as he could provide, hold those estates distinct from the Ormonde estates and title. This appears to have been his great object. Accordingly, such grandson, the son of John Butler and Lady Anne, who may take, is to hold only until he becomes the eldest son of Lady Anne and

(a) 1 J. & W. 82.

(b) 2 Moore, 219; 3 M. & S. 29; 6 Price, 41.

her then husband. On his becoming such eldest son, he loses the estate; and, if there is a younger grandson, it goes to him. We find no such clause respecting a great-grandson; and the absence of such clause leads, I think, to the inference, that a great-grandson was not the object of the testator's bounty, in preference to a grandson; for, such great-grandson would hold not subject to the provisions of the clause just adverted to, and might unite the characters of the first great-grandson of the testator taking his estate, and possessor of the Ormonde estates and title. Had John left a son, and Walter died without issue, and without having barred the entail of the Ormonde estates, such son of John would have taken the Ormonde estates and title, and, according to the construction contended for, would hold with them the Wandesforde estates, not subject to the shifting clause in the will. The same reasoning which was used to shew that the will ought to be construed so as to give estates, which would go to the son of a deceased grandchild, because it cannot be supposed that the testator intended the estates should go over as long as any such great-grandchild was living, would equally apply to other cases, and ought as well to induce the court to give estates to others, who do not take any by the will. For instance, no express estate is given to the son of a second or other marriage of Lady Anne, though *maintenance* is provided for him. Suppose that he takes an estate by implication, what would be the extent of that estate? Nothing is provided for his issue. Is his issue male or female, or either, to take, because it may be said, that it cannot be supposed the testator intended to give his estates to Mr. Talbot while any such issue was living? Again: is the second or third son of the second or other marriage to take for the same reason, though the will does not mention any such second or third son, nor provide maintenance for him? Is the *issue* of such second or third son also to take? Is the issue of the first son of John Butler to take for the same reason, though no express estate is limited to his father, and though such issue is not mentioned in the will? Again: is the will to be construed so as to give estates to the *daughters* of the grandson, because the court may think, that it was not the intention of the testator to give his estates to Mr. Talbot, so long as he had any lineal descendants; and that he would have made provisions accordingly, if his attention had been called to that state of facts? And again: may not the defendants ask, can it be supposed to be according to the intention of the testator, that the present plaintiff, being in possession of the Ormonde estates, and of the title of Ormonde, though the estates may not have been acquired under any old entail or settlement, should take the Wandesforde estates also, to the exclusion of the younger brother? And may not the plaintiff himself be excluded, by construing this will, not according to the meaning of the words found in it; but, according to what may be supposed to have been the inten-

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tion and wish of the testator? For, it may be argued, that, if the possibility of such a state of facts as existed at the time of filing this bill had been suggested to the testator, he would have more explicitly declared his intention, and excluded the plaintiff.

In my opinion, the court ought not to speculate as to what a testator would have done, if his attention had been directed to a particular state of facts, especially when it has not any means of knowing whether his attention was so directed. It is not to make a will for a testator; but to construe the will as it finds it; endeavoring to collect, from the will itself, the intention of the deceased; and giving effect to that intention, so far as the rules of law will permit, and the words used in the will will warrant. Whatever the intention may have been, if there are not words in the will to warrant it, either express or to be implied, it cannot have effect—(per Lord Hardwicke, in *Lomax v. Holenden* (a).) To this part of the case, the judgment of Chief Justice Tindal, in the case of the *Earl of Scarborough v. Doe d. Saville* (b), applies. He says, “no surmise or conjecture of any object which the testator may be supposed to have had in view, can be allowed to have any weight in the construction of his will; unless such object can be collected from the “will itself.” In my opinion, that is the safest course to adopt in the construction of wills.

In the case of *Driver v. Frank* (c), an express estate for life was devised to Bacon Frank, on which a remainder might be limited. Here, there is no estate for life devised to Lady Anne, preceding the limitation to the second son. The only estate for life she gets is one, in default of issue, capable of taking under previous limitations. But it has been argued, that although no estate for life is expressly devised to her, preceding the limitation to the second son; yet, as the will (as was argued) does not dispose of the whole of the rents during her life, she takes, as heiress-at-law, an estate for her life in the rents so undisposed of; and, it is said, that this estate is sufficient to support what is called the remainder to the second son. In order to see whether there is any foundation for the argument, it is necessary to advert again to the terms of the will, which devises the estates in question to four persons, “and the survivor of them and the heirs of such survivor, to hold in trust, and for the several uses intents and purposes therein after mentioned.” It will be material to attend to the words of inheritance added to the limitation to the survivor, when considering the question, whether the trustees took the legal estate in fee, or, only for the life of Lady Anne; for, I apprehend, it will be found, on reference to the authorities on this question, that, when there has been an express devise to trustees and their heirs,

(a) 1 Ves. 124.

(b) 3 Ad. &amp; El. 941.

(c) 2 Moore 219; 3 M. &amp; S. 22; 6 Price 41.

courts of justice have not controlled the legal operation of the words by any reference to the duration or extent of the trusts (a) (b).

But at present, I am merely considering whether there was any portion of the rents and profits of the estate undisposed of by the will. Having thus given the estate to the trustees, he declares the trusts, as to his real estate, to pay his wife during her life, out of the rents and profits of his estates in Yorkshire and Kilkenny, £800 per annum; (she died in his life-time, and therefore this direction had no effect); and subject to said annuity, and to all debts, judgments, mortgages, annuities and incumbrances, in trust, to permit and suffer his daughter, Lady Anne Butler, to receive, take, and be paid yearly out of the rents, issues and profits thereof, the sum of £800, to and for her sole and separate use, notwithstanding her coverture, for and during the term of her natural life. "*The residue and savings* out of the rents, issues and profits of the said Kilkenny estates, to be applied in payment of my Irish debts; *and the residue and savings* of my Yorkshire estates, to be applied in payment of the English debts, and the incumbrances affecting the same." If the will stopped here, there would be a complete disposition of the rents of the Yorkshire and Kilkenny estates, so long as there should be debts sufficient to exhaust the residue and savings of each, after payment of the £800 per annum, to Lady Anne. Then follows the devise: "after the decease of Lady Anne, leaving issue, as thereafter mentioned, in trust, and chargeable with said debts, to permit and suffer the second son of John and Lady Anne Butler, to receive the same;" and the testa-

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(a) See *Barker v. Greenwood*, 4 Mea. & Wels. 421, (published since the above judgment was pronounced.)

(b) For the defendants, it was insisted that the words of inheritance make no difference, and that the estate in the trustees is to be regulated and determined by the exigencies of the trust. *Lady Jones v. Lady Say and Sele*, 8 Vin. Ab. 262 pl. 19; *Shapland v. Smith*, 1 B. & C. 74; *Doe d. Pratt v. Timmins*, 1 B. and Ald. 530; *Doe d. White v. Simpson*, 5 East. 162; *Doe d. Plover v. Nicholls*, 1 B. & C. 336; *Waster v. Hutchinson*, 1 B. & C. 721; *Doe d. Brune v. Martin*, 8 B. & C. 497; *Glover v. Monckton*, 3 Bing. 13; *Doe d. Kelly v. Edlin*, 4 A. & E. 582; *Hawker v. Hawker*, 3 B. & Ald. 537; *Hearsdin v.*

*Williamson*, 1 Keen 33; *Doe v. Harris*, 2 D. & R. 36.

For the plaintiff, it was argued, that the trustees took the legal fee: *Shaw v. Weigh*, 2 Strange, 799; *Gibson v. Lord Mountford*, 1 Ves. sen., 485 & 491; *Onter v. Crook*, 3 Burr., 1684; *Henton v. Henton*, 7 T. R. 652; *Wykham v. Wykham*, 11 East, 458; *Doe v. Woodhouse*, 4 T. R. 89; *Doe v. Willan*, 2 B. & A. 84; *Chapman v. Blisset*, Ca. Temp. Talb., 145; *Hopkins v. Hopkins*, Weeks' R. *Bagshaw v. Spencer*, 1 Ves. sen. 143. The power to make leases not a power in gross; but the demise derived out of the estate of the trustees, and not merely effectual by the power. *Sir E. Clarke's case*, 6 Rep. 17 b.; *Doe v. Willan*, 2 B. & A. pp. 81, 89, 90 & 91.



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tor orders and directs, that such second or younger son shall have and receive thereout, and out of the rents and profits, from his birth, during the life of his mother, until he attains eighteen years of age, £200 per annum; from that time until he attained twenty-one, £500 per annum; and afterwards, £800 per annum, until the decease of his mother; "*and the residue* of the rents and profits shall, until such younger son shall attain his age of twenty-one years, be applied in discharge of the incumbrances affecting my said real estate, as aforementioned;" and for want of such issue male, or second son of Lady Anne, to permit and suffer the eldest son of Lady Anne, by any after-taken husband, taking the name and arms of Wandesforde, to receive from the time of testator's decease £200 per annum, during the life of his mother, for his education and maintenance, until he arrived at eighteen years of age; then, £500 per annum, until he came to the age of twenty-one; and afterwards, £800 per annum, until the decease of his mother. And for want of such eldest son of a future marriage, to permit the eldest son of John Butler and Lady Anne, taking the name and arms of Wandesforde, to have the like annuities for the same periods. The will then proceeds:—"and the residue of the rents, issues, and profits, shall, until such elder or only son shall attain his age of twenty-one years, be applied in discharge of the incumbrances affecting my said real estates." Thus, the direction to pay sums for the maintenance of the second son of John Butler and Lady Anne, or of their only son, is followed by a declaration that the residue of the rents shall, until such second or only son shall attain twenty one, be applied in discharge of the incumbrances. But, it is not declared that the residue *shall not* be applied in payment of the debts, after the second or the only son of John Butler and Lady Anne shall have attained twenty-one years. It will be observed, that there is no such direction after the clause which provides for the maintenance of the eldest son of Lady Anne, by any future marriage. I think, that this direction amounts merely to a declaration, that after deducting the sums allowed for maintenance, the residue shall be applied during the minority as before directed; but that it does not control the previous clause, which directs the application of the residue, during the life of Lady Anne, so long as any of the debts remain unpaid. But if there was no other clause in the will, it might be contended (as was argued) that, if the debts were paid before the death of Lady Anne, she having issue, capable of taking on her death, there might be a portion of the rents undisposed of during her life. I do not say that this would be the case, though we had nothing more in the will; but the next clause shews, in my opinion, that any such portion cannot be considered as undisposed of. It says, "for want of such eldest issue male of the Lady Anne Butler, then in trust as to said estates in the counties of York and Kilkenny, and the whole saving

"thereof, except as aforesaid, to the use of the daughter and daughters of my daughter Lady Anne, as tenants in common, and the heirs of the body and bodies of such daughter and daughters." This clause would, in my opinion, give to the daughters any residue or savings of the estates accruing during the life of Lady Anne, after paying the annuity for her, the maintenance, and the debts; and, as the daughters of Lady Anne were to take only in default of a second or an only son of John Butler and Lady Anne, or an eldest son of another marriage of Lady Anne, I think that such second or only son, or such eldest son of a future marriage taking the estates after the decease of Lady Anne, would also take any such residue or savings; and, therefore, that so long as there was a son or daughter who could take the estates under the limitations of the will, if Lady Anne was dead, she could not, as heiress-at-law of the testator, take any portion of the rent as being undisposed of by the will.


The next clause proceeds to dispose of the estates, in case Lady Anne should have no child who would be capable of taking under the previous limitations, if she were dead. It gives the estates, in that event, to Lady Anne for life, without the control of her husband: it gives, as I apprehend, to her, that which the previous clause had given to her daughters, including the residue and savings. Having thus given to her this residue, it proceeds to enable her by deed or will to dispose of the rents, issues, and profits of the said real estates, and all savings arising thereout, after payment of said debts and other incumbrances, in such manner as she shall think fit. Thus, clearly shewing that it was intended, by the previous devise to her, to include the residue and savings; and enabling her not merely to take the interest and produce of such savings and residue during her life, with the accruing rents of the estate, but to dispose thereof by deed or will. This clause, and the one containing the devise to the daughters shew that the testator conceived there might be an accumulated fund produced out of the surplus of the rents, after paying the debts, annuity, and maintenance; and such fund is in express terms given to his daughter for her life, with power to dispose of it.

On the whole will, I am of opinion, that it was the intention of the testator, to dispose thereby of the whole of the rents and profits of his estates accruing during the life of Lady Anne; that the words of the will are sufficient to do so; and that Lady Anne did not, as heiress-at-law, take any estate or interest in the Kilkenny or Yorkshire estates, as being undisposed of by the will.

But, even if Lady Anne Butler did take, as heiress-at-law, any estate or any portion of rents, as being undisposed of by the will, the plaintiff could not, in my opinion, successfully contend (as his counsel have insisted), that she took an estate for life. In cases arising on the construction of *deeds*, it has been held, that where there is a conveyance to uses

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without consideration, and the whole use is not disposed of, the grantor will take an estate by implication. If, for instance, an use is limited which cannot commence till after his decease, he will have an estate for his life by implication; unless an express use is limited to him inconsistent with such implication; and such an estate will be consolidated with a subsequent limitation in the same deed to the heirs of his body. Mr. Fearne, speaking of this doctrine, in page 57 of his book (72, of Mr. Butler's edition), and of the rule that the estates should be limited by the same conveyance, says, "Though the freehold was by implication, yet, that implication arose upon, and was the effect of the same deed as contained the limitation to the heirs of the body; and consequently, both estates might, in the case of *Pybus v. Mitford*, be referred to the same deed." But, this doctrine, whether the reasoning be satisfactory or not, has never, by any judicial determination, been applied to the case of an heir-at-law taking an estate, as being undisposed of by his ancestors' will for any particular period. The general rule, in cases of devises, is, that when the freehold is not disposed of in the mean time, between the death of the testator and the period at which the devisee is to take, the freehold and inheritance descend to the testator's heir-at-law;\* but in no decided case has it been held, that the estate which the heir takes is one, merely for the period intervening between the death of the testator and the happening of the event on which the devisee is to take.

*Hopkins v. Hopkins* † has been cited for the purpose of shewing that the eminent Judge, in that case, was of opinion, that the equitable right to the profits, which belonged to the heir-at-law until the birth of a son, was sufficient to support the remainder. His words, as reported, are "that he took it to be otherwise when it was mentioned at the bar; but after reflecting on it, he apprehended that *more might be said to maintain it* than he had been aware of." Mr. West says, in the preface, that the cases are reported from Lord Hardwicke's Note-books and other papers; and he further states that the judgment in *Hopkins v. Hopkins* is taken verbatim from a manuscript in Lord Hardwicke's handwriting. The objection to this doctrine is stated in the judgment as reported, to be, that the particular estate and the remainder must be created at the same time, as making part of the same estate. Lord Hardwicke then refers to cases in which the estate for life was not limited by the conveyance, but taken by way of a resulting use; and citing *Pybus v. Mitford*, where a man covenanted to stand seised to the use of his heirs male, begotten on the body of his second wife, and it was held

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\* Fearne on Remrs., 537-8; † *West's Cases, temp. Lord Gore v. Gore*, 2 P. Wms. 28; Hardwicke, & 1 Atk. *Pay's Case*, Cro. Eliz. 878.

that an use for life remained in him, which would unite with the limitation, in the conveyance to his heirs male; his Lordship asks,—why should not the resulting trust of the freehold, in the case before him, support the contingent remainder, though not connected with it? But, he adds, “on this point, I would not be understood to give any absolute opinion.”

If the law be *as suggested* in Lord Hardwicke’s judgment, it would follow that limitations in wills, which have been always treated as executory devises and not as remainders ought to have been held to be remainders supported by the estate which descended to the heir-at-law: it being a well settled rule, that when a limitation can take effect as a remainder, it shall not be construed to be an executory devise. A devise to T. S. for life, or in tail, *from and after the decease of A. B.*, would, according to the doctrine contended for, operate as a limitation of a remainder to T. S.—the particular estate on which it was to depend being vested in the heir of the testator, for the life of A. B. Such limitations have been always considered to operate by way of executory devise: the freehold and inheritance, and not merely an estate for life, being vested in the heir as undisposed of, the heir takes nothing by implication under the will; but claims by his better and paramount title. It is not like the case of a deed; and I apprehend that the objection adverted to by Lord Hardwicke, viz., that the remainder and the particular estate must be created at the same time, is not the only one that could be urged against the position. If the fee descends, it is plain that any limitation to take effect afterwards cannot operate by way of remainder, but must operate by way of executory devise. Therefore, with every deference to the authority of the truly eminent Judge, whose opinion is relied on, I cannot accede to the doctrine contended for; and even if I thought that Lady Anne took some estate as heiress-at-law, I would not hold that she took an estate for her life with a remainder in tail to John, the second son of John Butler. It will be recollected that she takes under the will an annuity of £800 during her life.

The plaintiff’s counsel next contend, that if the court shall not decide that John, the second son of Lady Anne, took a vested remainder in tail, it ought to hold that he took an estate tail by way of executory devise; which executory devise, as they contend, gave to him such an estate in the lands, as enabled him, with the concurrence of his mother, and without the sanction or concurrence of the trustees named in the will of the Earl of Wandesforde, to bar, by recovery, all the subsequent limitations in the will, and acquire the fee. They say that the recovery, suffered by him and his mother, had that effect; that the deed of 9th November, 1793, operated as a valid settlement of the estates; and that under the limitations of that deed the plaintiff is entitled to them.

Assuming that John, the second son, living at the death of the tes-

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tator, took an estate tail by way of executory devise, it must have been one which should vest in possession on the death of his mother. The express terms of the will are, *after the decease of Lady Anne, &c.*, in trust to permit and suffer the "second son of John Butler, and Lady Anne," &c., &c. If I am right in construing the will as I have done, Lady Anne took no estate under the will; nor as heiress-at-law, any estate preceding this devise; and, therefore, the recoveries cannot derive any validity from her having joined in them. They must be supported, if at all, as the recoveries (supposing John, the second son, to be the person to take) of a person entitled, under an executory devise, to an estate, from and after the decease of another. I think a person entitled as such executory devisee takes no estate, by virtue whereof he could suffer a valid recovery without the concurrence of the person in whom the freehold is in the mean time vested, until the event, on which he is to take an estate in possession, happens. When I say a *valid* recovery, I mean one which would have the effect of barring the estates limited to others, subsequent to his estate; and do not mean to say, that the recovery now under consideration might not effect the issue of the person by whom it was suffered. But he could not make a valid tenant to the *precipe*: according to Mr. Butler's note to Fearn, p. 1. he has neither a vested, nor a contingent estate; though the limitation confers on him a fixed right to an estate in possession at some future period. I think, therefore, that the recoveries suffered by John Butler, the second son of Lady Anne, did not bar the limitations to his brothers; even, supposing him to be the person who would be entitled to take the estates, under the description of the second son of Lady Anne.

Assuming, in the same manner, that the father of the plaintiff became entitled, under this executory devise, on the death of his brother John, I proceed to consider, whether, on this construction of the will, he ceased to be so entitled on becoming the eldest son of John Butler, on the death of Walter Marquis of Ormonde? \* The words of the will are, "to permit and suffer the second son of John Butler and Lady Anne, *taking the surname and arms of Wandesforde, and the heirs male of his body*, to receive the same, in preference to the eldest son": it being the testator's "intent and meaning, that such second son do take and be preferred," &c. &c. "until he shall become an eldest son; and so shall each and every second or younger son or sons take, place, and enjoy the said estates, according to their seniority of age and priority of birth, and the heirs male of the body of such second or younger son and sons."—I am of opinion, that the words used in the latter part of

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\* The plaintiff contended, that the shifting clause in the will applied only to the estate of the first taker: *Earl of Scarborough v. Saville*, 3 A. & E. 897.

this clause annexed to the estate of every younger son, taking under the will, the same limitation which the words in the first part of it annex to the estate of the second son; and, consequently, that the late Marquis, even if he was for any time entitled under the executory devise, as the second son then living, ceased to be so entitled, when, by the death of Marquis Walter, he became the eldest son. The words "and so shall each and every younger son and sons," &c. appear to me to mean, *each and every younger son shall take in like manner, until he shall become an eldest son*. This clause is altogether free from the difficulty which arises on the shifting clause in the deed of 1793: the testator does not add to the words "eldest son" the words "*who shall become entitled to the Ormonde estates*;" he makes the simple fact of becoming the eldest son, that which is to put an end to the title under his will.

The case of *Stanley v. Stanley*(a) is not, in my opinion, an authority against this construction. There, the proviso affected the estate for life only, and there was a distinct limitation in tail to the son, not affected in terms by the proviso; and the question was, who was the person next in remainder under the limitations in the will? Here, the estate which is to cease is an estate tail—which is the estate claimed by the plaintiff; not a remainder next after the estate affected by the shifting clause. The case of *Fazakerly v. Forde*(b) applies rather to the effect of the shifting clause in the deed of 1793, than to the construction of the clause in the will. There appears to me, to be no sufficient reason for confining the operation of the clause in the will to the second son only; the intention being, as I think, that it should apply to all the sons; and the words being, in my opinion, sufficient to enable the court to give effect to that intention.

I have hitherto assumed that the construction of the will ought to be as contended for by the plaintiff, viz.—that the person who was, *at the death of the testator*, the second son of Lady Anne and John Butler, was the person intended to take, and as such entitled: but I do not mean to say that I would be disposed so to construe the will. The paramount object of the testator to be collected, as I think, from his will, was to create a new family, which should represent his estates and bear his name and arms; and, as far as he could, to prevent the union of his estates with the property which the eldest son of John Butler would take. We find, that even when he gives his estates to the eldest son of John Butler, who, according to the statement in the bill, was to take the Ormonde estates on the death of his father, he provides that he shall take the name and arms of Wandesforde; and he prefers to him all the other sons of John Butler and Lady Anne, and her eldest son by any future marriage. The period at which the person to take his estates is

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(a) 16 Ves. 491.

(b) 4 Sim. 393.

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to be ascertained must, I think, be either the death of the testator, or the death of his daughter; and, when the court is called upon to say which of these periods it will fix upon, it appears to me to be but reasonable to consider which construction would be most calculated to effectuate the paramount intention of the testator.

By holding that the person to take must be considered as designated, and that he should take immediately after the death of the testator, though the enjoyment of the estate was to be deferred, greater facilities are afforded for defeating the intentions of the testator, and the limitations in his will. This consideration will not prevent the court from giving legal effect to limitations in a will, when the settled rules of construction require that they should be construed so as to give the first taker the power of defeating the subsequent limitations; but, still, I think, it ought to have some weight when the court is called upon to construe an obscure and imperfect will, like the present. By adopting the construction contended for, a great grandson might take the Ormonde and Wandesforde estates, notwithstanding the declared wish that they should not unite, and this, without assuming the name and arms of Wandesforde. By holding that the person to take was not ascertained, until the death of the testator's daughter, the period at which the limitations of the will might be defeated, by the person taking under it, is postponed. If it was the intention that John should take as being the second son of Lady Anne, the testator would, most probably, have named him: he was living when the will was made, and at the death of the testator; yet he is not named. If the testator intended that the person to take should be the second son *at the death of his daughter*, he could not state in his will the name of that person. We do not find him *named*, though he is described. Then we have the words used in the will to fix the period at which the devisee is to take, viz., *after the decease of Lady Anne, leaving issue, as thereafter mentioned.*

The reports abound with decisions as to the meaning of the words "leaving issue," in a will. Some of them are founded on distinctions not very intelligible; but, the rule generally established as to the meaning of these words, when relating to real estate, has, in effect, been declared by the recent statute of wills, to be one which, in many instances, operated to give estates which the testator did not intend to devise. However, in the greater number of those cases, an estate of some extent was devised to the person upon whose death, without issue, that estate was to go to another; and the question was, what estate such devisee took. Here no such question can arise. The testator says that, after the decease of his daughter, leaving issue, as thereafter mentioned, his estate shall go to the person described. The question is not what estate the daughter took; but, at what period his devisee is to be ascertained, and to take.

It is not necessary, in the present case, to express any opinion as to

the propriety of holding, that the words "leaving issue" ought, when applied to real estate, to receive the construction which has been given to them. But, the reasons assigned for giving that construction cannot apply to the present case. The testator has stated in his will, a period, at which his estates are to go to his devisee, and an event, on the happening of which such devisee is to take. That period is the death of his daughter: the event, her leaving issue as mentioned in the will. The latter could not be ascertained until her death. By holding that the devisee was not ascertained until that event, full effect is given to the words of the will. By deciding that the devisee was or could be ascertained immediately after the death of the testator, without regarding whether his daughter should die leaving issue, the words of the will which refer to her leaving issue are rejected, or rendered inoperative.

Again, looking at the will, we find that the testator directs, that maintenance shall be paid during the life of his daughter, to such son as would take her estates if living at her death. I do not advert to the direction to pay this maintenance *from the time of the birth of the son*; because I am unwilling, at any time, to rest my opinion on any particular word, or passage in a will, and because I find another clause directing maintenance to be paid to the first son of a second marriage, and from the death of the testator. The maintenance, however, in my opinion, is not for any person *named*: not for the son who should be the second son of Lady Anne, living at the death of the testator; but, as I construe the will, for the person who should, if the testator's daughter was dead, take his estates under the provisions of his will. It appears from the will, that the testator owed some debts; and one of his objects appears to me to have been, to vest his estates in trustees, for the purpose of paying those debts, and the annuity to his daughter, and maintenance for the person who should take his estates on the death of his daughter, and to keep his estates separate from the Ormonde estates. There is not, in my opinion, any principle of law, or any rule of construction which prevents the court from carrying that intention into effect. The limitation to the trustees and the survivor, and the heirs of the survivor, gave a contingent estate in fee to that survivor, in trust for the person entitled under the will. In the events that have occurred, the defendant, Charles Wandesforde, is, in my opinion, the person so entitled. The plaintiff has not, as I think, any right to maintain his suit against the persons who have demurred; and, therefore, my order will be to allow the several demurrers.

Viewing the case as I have done, it is not necessary to give any opinion as to the effect of the shifting clause in the deed of 9th Nov., 1793. I regret that I have been prevented giving this judgment in the course of last Term, that the parties might have had the earliest opportunity of carrying this case to a higher tribunal, which I hope and expect they will do.

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## EQUITY EXCHEQUER.

*Saturday, January 12th, 1839.*DISMISSING BILL UNDER ACT FOR ABOLITION OF  
TITHES (1 & 2 VICT. c. 109)—PRACTICE—COSTS.

BURGH v. KENNY and others.

Under the 1st section of the act for the abolition of tithe composition in Ireland (1 & 2 Vict. c. 109,) a plaintiff is entitled to dismiss his bill, without payment of costs, although it was filed for the recovery, not only of tithe composition due for the years 1834, 1835, & 1836, but also of the arrears or additions recoverable therewith, under the provisions of the Million act.

And he may dismiss it against one of several defendants, retaining it against the rest. As a general rule, the costs in a court of Equity follow the result.

The bill in this case was filed for the recovery of the tithe composition due for the years 1834, 1835 and 1836, and also for the recovery of the instalments added thereto by the Million act. Kenny, one of the defendants, answered the bill, denying his liability, and stating, in contradiction of the allegations in the bill, that he never held any lands in the parish during any part of the time mentioned in the pleadings, otherwise than as a tenant from year to year. The act for the abolition of tithe composition (1 & 2 Vict. c. 109) having afterwards passed, the plaintiff, who had not replied to the defendant's answer, in September last entered a rule as of the 23d June preceding,\* that he should be at liberty to dismiss the bill as against the defendant Kenny, without costs, pursuant to the first section of the act. The bill was retained against the other defendants.

Mr. *Hatchell*, Q. C., now moved, on behalf of the defendant Kenny, that the rule of the 23d June last should be varied or set aside, so far as the same exempted the plaintiff from the payment of costs to the said defendant, and that the plaintiff should not be at liberty to dismiss the bill as against the defendant Kenny, except upon the terms of paying him his costs in the cause, and that those costs should be referred for taxation.

Mr. *Hatchell* and Mr. *O'Callaghan*, in support of the motion. The rule now sought to be set aside was entered in pursuance (professedly) of the first section of the 1 & 2 Vict. c. 109, by which it was provided that where any suit, action, or other proceeding, should have been commenced previous to the 16th July, 1838, for the recovery of any tithes or composition for tithes, the plaintiff might "either prosecute such action or other proceeding, or discontinue or dismiss the same, without payment of costs, at his option." Now the plaintiff here has not dismissed his suit, for he retains the bill against the other defendants—[PENNEFATHER, B. The suit is a distinct proceeding against each de-

\* That being the last day of the Equity sittings after Trinity Term.

pendant, within the meaning of the clause.\*]—Again, the bill was filed for the recovery, not only of the tithe composition due for the years 1834, 1835, and 1836, but also of the additions or instalments recoverable therewith under the Million act; and we contend, on the part of the defendant, that the suit, so far as it was for the recovery of these additions, was not such a proceeding as, under this section, the plaintiff could, at his option, dismiss without payment of costs.—[PENNEFATHER, B. Do not the words tithe, or tithe composition, extend to the instalments added thereto by the Million act?—They might, if the clause stood alone; but how is it introduced? The first section begins by enacting, “That the rights of all persons in and to all tithes, or composition for tithes, hereafter accrued, or at any time hereafter to accrue due in Ireland, shall wholly cease and determine;” and then goes on to provide, that to certain tithes included in that general description, that enactment extinguishing the right shall not extend, and, amongst others, that it shall not extend to “any tithes, or composition for tithes, for the recovery whereof any suit, action, or other proceeding shall have been commenced, previous to the 16th day of July in this present year (1838), in any court of Law or Equity, but that the plaintiff may either prosecute such action or other proceeding, or discontinue or dismiss the same, without payment of costs, at his option.” The clause, therefore, which enables a plaintiff to dismiss his bill without payment of costs, is a part of that proviso, by which certain cases are excepted out of the general enactment with which the section begins. It can apply, therefore, only to those cases to which the exception, of which it is a part, applies; and the exception can only extend to cases to which, but for the exception, the general enactment would have applied. The suit, in order to be one which the plaintiff is entitled to dismiss without payment of costs, must be a suit commenced before the 16th July, 1838, for the recovery of tithes or tithe composition, the right to which would, but for this exception as to suits commenced before that date, have been extinguished by the general enactment with which the act begins. Now, it is expressly enacted, by the second section of the act, that the “enactment extinguishing the right to composition for tithes, accrued or to accrue due, shall not be taken to extend to the additions made by the Million act to such compositions,” and that those additions shall be payable and recoverable as if the act had not been passed; and the sections immediately following provide for the recovery and remission of these additions, in a way quite different from that in which the recovery and remission of those compositions, to which alone the enactment or provisoes of the first section clearly apply, are

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\* This objection was not further relied on.

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afterwards provided for. It is plain, then, that no part of the first section was intended to apply to these additions, and the present suit, so far as it is a suit for the recovery of them, is not a suit which the plaintiff may, under that section, dismiss without payment of costs.—[RICHARDS, B. The concluding clause of the first section, which immediately follows, "And if he shall think fit to discontinue the same, and if such "tithes, or composition for tithes shall have accrued due for the years "1834, 1835, 1836 or 1837, or any of them, then," &c., shews that the power of dismissing without costs was to extend to suits for other tithes besides those due for the years 1834, 1835, 1836 or 1837. What other, if not the arrears or additions recoverable under the Million act?]—The tithe composition due for the years preceding those mentioned in the act. It was not compulsory on the tithe owner to seek relief under the Million act, and there are suits now pending for the tithe composition due for the years 1832 and 1833. In the present case, it is quite clear, from the pleadings and the affidavits on both sides, that if the cause were brought to a hearing, the bill, as against the defendant Kenny, must be dismissed, *with costs*; and the plaintiff has taken advantage of the passing of the act, in order to escape the payment of those costs, and not in furtherance of the object of the legislature, to put an end to litigation, for he retains his bill against the other defendants.

Mr. *Litton*, Q. C., and Mr. *Napier*, who were for the plaintiff, were not called upon by the Court.

PENNEFATHER, B.—The words of the clause under which this rule has been entered, include the additions made by the Million act to the tithe composition of 1834, and the following years, as well as those compositions; and I see nothing in the second or following sections to prevent our construing those words according to this their obvious meaning. I am sure that, in giving this effect to the clause in question, we are doing what the legislature intended should be done. We must refuse the motion.

RICHARDS, B. concurred.

Mr. *Hatchell*.—Without costs? The statute is recent, and certainly not very clear; the objection is new, and the merits are with the defendant. But for the act, the bill must, as against him, have been dismissed with costs.

PENNEFATHER, B.—The costs must follow the result. There are some observations on the subject of costs, in a judgment of Lord Cot-

tenham's, reported in the last number of *Mylne & Craig's Reports*,\* in which I entirely concur, as to the propriety of making this the general rule, and it is one to which, I think, there should be very few exceptions.

Motion refused, with costs.

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\* The passage referred to by the learned Baron appears to be the following. (It occurs in Lord Cottenham's judgment in *Millington v. Fox*, 3 My. & Cr. 352, 353.) "The question of costs, in Chancery, is left to the discretion of the court. That discretion ought to be exercised, as far as possible, according to some principle; and

"I am very much disposed, as a general rule, to make the costs follow the result: because, however doubtful the title may be, or however proper it may be to dispute it, it is but fair that the party who really has the right should be reimbursed, as far as giving him the costs of the suit can reimburse him."

*Saturday, February 2d, and Tuesday February 5th.*

#### ADMISSION OF ATTORNEY—SOLICITOR— APPRENTICESHIP.

In re LYONS.

Mr. KEATINGE, Q. C., applied on behalf of the petitioner, Mr. Timothy Lyons, that he should be admitted an attorney of this court, under the following circumstances.

The petitioner, who had been bound apprentice to his brother, an attorney, in November, 1829, applied to this court to be admitted an attorney in Michaelmas Term, 1834. The court refused the application, on the ground of the applicant, during the apprenticeship to his brother, having been a salaried clerk in the office of Mr. Darley, one of the Six-clerks of the Court of Chancery, but gave him liberty to make a special case for his admission in the following Term.

An application founded on a special case having been accordingly made in a subsequent term, the court directed a reference to the examiners, to inquire and report the nature and extent of the petitioner's engagements in the Six-clerk's office. On the 16th of June, 1835, the examiners made a report, stating that the petitioner was, during the period of his apprenticeship, clerk in the office of Mr. Henry Darley, who was one of the Six-clerks in the Court of Chancery; that the said petitioner was, in the early part of his apprenticeship, second clerk in the

A person who, during the period of his apprenticeship to an attorney, had received a salary as clerk, in the office of a Six clerk in the Court of Chancery, and who had been admitted a solicitor of that court, admitted under the particular circumstances of the case, an attorney of the Court of Exchequer.

According to the true construction of the 7 G. 2, c. 5, Ir., any person who seeks de

*jure* to be admitted an attorney of the Irish Courts, must serve an apprenticeship for the term of five years; and during that period, must devote his whole time to the service of the master to whom he is bound.

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said Six-clerk's office, and that from the month of May, 1832, and during the remainder of his apprenticeship, he was chief clerk in the said office, at a salary of £250 a year, which clerkship he still held: that the nature and extent of the petitioner's engagement, in the said Henry Darley's office, was the general superintendence, under the said Henry Darley, of said office; and the conduct and direction of the business thereof, and of the several clerks employed in said office, and also, of giving the solicitors and their apprentices, and clerks, the necessary instructions and information to assist them in their practice in said court, and as usually given to them by the chief clerks of Six-clerks, or, by the Six-clerks themselves: and that the said petitioner, though paid by the said Henry Darley, for his attendance during the usual office hours, had no occasion to be in said Henry Darley's office in the early part of the day, and consequently could, and did, devote that portion of time to the business of the office of his brother, and that the said H. Darley was aware thereof. In the month of June, 1835, another application, founded on the preceding report, having been refused by this court,\* the petitioner, in the month of January, 1838, presented a petition to the LORD CHANCELLOR, praying, that in consideration of his services, and the peculiar circumstances of his case, he might be admitted to practise as a solicitor of his Lordship's court. The LORD CHANCELLOR, having heard the case fully debated, granted the prayer of the petition, and admitted Mr. Lyons a solicitor of the Court of Chancery.†

Mr. Keatinge, Q.C., for the petitioner.—The claims of the present applicant are peculiarly strong. He has been now admitted a solicitor of the Court of Chancery upwards of a year; and it is evident from the judgment of the LORD CHANCELLOR, as reported, 6 *Law Rec. 2d ser.* p. 119, that his Lordship would not have allowed the claims of this gentleman, had he not made a very strong case. The statutes relating to this subject are the 7 G. 2, c. 5, ss. 2 & 9 *Ir.*, and the 13 & 14 G. 3, c. 23, ss. 4 & 9 *Ir.* The 4th section of the latter statute superadds certain requisites to those prescribed by the former, but, the 9th section reserves to the Judges their ancient discretionary power of admitting or rejecting, in proper cases, persons applying to be admitted attorneys of their respective courts.‡ This is not an application to vary any for-

\* See a report of this application, 6 *Law Rec.* (2d series), 116, n.

† See a report of the application in Chancery, 6 *Law Rec.* (2d series), 116, S. C., 1 *Drury & Walsh*, 327.

‡ By the 9th section of the 13 and 14 G. 3, c. 23, it is provided, that "this act, or anything herein contained, shall not extend or be construed to extend, to prevent the said Judges, or Barons, or any of them, from examining and

mer order of this court, but an application founded on matters which did not exist at the time the former order was made.

PENNEFATHER, B.—The office of Six-clerk has been abolished since the application to the court on a former occasion, so that it may be fairly contended, that the danger of establishing a precedent, by the admission of this gentleman, no longer exists.

Mr. *T. B. C. Smith*, Q. C., opposed the application on the part of the Law Society.—Against Mr. Lyons, personally, it is at once conceded there can be no objection, but the members of the Law Society, conceiving a very important question, as affecting the respectability of their profession, to be involved in the present case, are naturally apprehensive lest his admission as an attorney may be drawn into a dangerous precedent. The question is, whether or not this is an apprenticeship, such as the act of the 7 G. 2, c. 5, requires? That act, so far as it authorised an apprenticeship to a Six-clerk, had been repealed before the present applicant commenced his apprenticeship, by the 4 G. 4, c. 61. s. 12, which prohibits a Six-clerk from practising as a solicitor or attorney, under a penalty of £200. The only question, therefore, is, whether Mr. Lyons served a legal apprenticeship of five years to his brother? It appears from his own affidavit, that the hours of his attendance in the Six-clerk's office were, from twelve to four in Term time, and from twelve to three in vacation, and that the remainder of his time he was at liberty to devote to the business of his master. That an apprentice cannot serve any person, except the master to whom he is bound, is established by the case of *Ex parte Hill (a)*, which may be considered as the leading case upon the subject. That case closely resembles the present, but, having been an application to strike an attorney off the rolls, is not so strong as this.—[PENNEFATHER, B. The difficulty here is that for certain hours of the day the apprentice, having been occupied with other business, was necessarily obliged, during that portion of his time, to relinquish the business of his master.]—And the hours, during which he was so occupied, were those of transacting business in the various offices of the courts. The principle which the court is now called on to establish is, that it is not competent for an apprentice to

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<p>“inquiring into the character and “qualifications of such persons, as “shall apply to be admitted attor- “nies in their respective courts, or “from admitting or refusing to</p>	<p>“admit such persons in such man- “ner, and with discretion, as the “said Judges and Barons respect- “ively have heretofore in that “behalf lawfully used.”</p>
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undertake duties, the discharge of which may be necessarily inconsistent with his situation, and with the attendance due to the business of his master. *In the matter of Taylor (a)*, an attorney, who, during the term of his clerkship held the office of surveyor of taxes, was struck off the rolls. Bayley, J. observing, that as the party, when he entered into the service of the attorney, was not *sui juris* to contract, so as to give to the master a control over him during the whole time and term, he was of opinion that the act had not been complied with. Notwithstanding the admission of this gentleman by the LORD CHANCELLOR, the question for the consideration of the court on the present application is, whether a person has served an apprenticeship within the meaning of the act of Parliament, who has placed himself in a position which may have had the effect of disabling him from performing the important duties which an apprentice is bound to perform for his master? With respect to the 9th section of the 13 & 14 G. 3, c. 23, the legislature did not thereby mean to give the court a power of admitting a person, who had not perhaps served an apprenticeship of a single day; but the intention of the legislature was not to take away the judicial discretion of the court, as to the rejection of persons applying to be admitted attorneys, even though they may have complied with the various requisites prescribed by the act.

Mr. Blake, Q. C., in reply.—From the difference between the English and Irish statutes, it is manifest, that a much larger discretion is vested by the latter in the Irish, than by the former, in the English Judges. The discretionary power of this court to admit a party where there has not been a compliance with the provisions of the statute, was not taken away by the legislature, but, on the contrary, the concluding section of the 13 & 14 G. 3, c. 23, preserves to the court, unimpaired, the power of admitting a party, in any case, where, in the exercise of its discretion, it may think proper to do so. This appears, as well from the words of the act, as from the constant practice of this court.—[RICHARDS, B. Unquestionably, there are several persons, now of eminence in their profession, who, during the period of their apprenticeships, were engaged in the performance of duties similar to those performed by Mr. Lyons in the Six-clerk's office.]—The ground of the decisions in the cases of *Hill* and *Taylor*, was the fact of the parties not having devoted their *whole* time to the service of their masters; and the courts in those cases, actually used the words of the English statute, requiring the apprentice to serve the person to whom he is bound, and to continue in such service for five years. There is no such provision in the Irish act. The 7 G. 2, c. 5, directs that there shall be a service, but does not state what that service is to be; whereas the English act goes further

(a) 4 B. & Cr. 541; S. C. 6 D & R. 428.

and describes the nature of the service, namely, a service to the master for five years. The language of the latter act is mandatory and imperative, and leaves no sort of discretion in the court.—[PENNEFATHER, B. I think the English and Irish acts are substantially alike, and must receive the same construction. The service meant by the 7 G. 2, c. 5, *Ir.*, is, in my opinion, the same kind of service as that meant by the 2 G. 2, c. 23, *Eng.*]—At all events, a practice, prevailed almost universally at one period in this country, for persons while serving their apprenticeships to one solicitor or attorney, to give a portion of their time to the business of another, and to receive a salary for their services. That such a practice existed, is not denied on the part of the Law Society, but it is said, that it was a vicious practice; admitting it to be so, yet, as it was a practice which prevailed for a series of years, the present petitioner would have much reason to complain, were a new practice to be adopted and applied to his case; it would, in effect, be giving to the statute an *ex post facto* operation. The case of Mr. *Murphy* who was recently admitted an attorney of this court, was a much stronger one than the present. That gentleman, while serving his time to one solicitor, acted as the conductor and manager of the business of a Mr. Leland, another solicitor, and received a salary for his services from the latter. In reference to the argument that the party must be *sui juris*, to contract at the time he is bound, it appeared that Mr. *Murphy* was in the actual receipt of a salary at the time his apprenticeship commenced. There are two classes of cases in which the court has the discretionary power of admitting or rejecting a party who seeks to be admitted an attorney. One is, where the candidate for admission has served the proper master, but has not completed the full period of his apprenticeship; the other, where he has completed the period of his apprenticeship, but has not devoted his whole time to the service of his master. The present case falls within the latter class, and the question now to be considered is, whether this be a fit and proper case for the exercise of the discretionary power of the court in favor of this gentleman's admission? On his part it is respectfully submitted that it is.

*Cur. adv. vult.*

CHIEF BARON.—In this matter, Mr. Lyons, who has been already admitted a solicitor of the court of Chancery, seeks to be admitted an attorney of the Court of Exchequer. The court has considered his application, and on examining the statutes, it is of opinion, that by the last clause of the 13 & 14 G. 3, c. 23, there is reserved to it a discretionary power of admitting or rejecting, under the circumstances of each particular case, a party applying to be admitted an attorney. Having also considered the provisions of the act which prescribes the time of service, and the circumstances necessary to qualify a

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person to be admitted an attorney, it is of opinion, that Mr. Lyons has not strictly complied with those provisions, or served an apprenticeship under all those circumstances which the act requires. The court does not consider the statute to have been complied with, in a case where the apprentice has entered into an engagement to devote a portion of his time to the service of a person who is not his master, even though that person be in the same walk of life as the master. We, therefore, think that Mr. Lyons has not performed that kind of apprenticeship which is contemplated by the earlier sections of the act, and, which would entitle him to be admitted an attorney as a matter of right; but we think, it would be hard to visit upon Mr. Lyons, retrospectively, the consequences of having been misled by a practice, which, at one time, so generally prevailed. We, consequently, conceive this to be a fit case for the exercise of the discretionary power we possess, of dispensing with the requisites in strictness imposed by the statute.

There is an additional circumstance which has considerable weight with the court, and that is, the fact of another court having thought it expedient to exercise, in this gentleman's favor, the discretionary power with which it is invested by the statute, in common with this court. Under all the circumstances of the case, we, therefore, think that Mr. Lyons may be admitted an attorney of the court.

PENNEFATHER, B.—I concur in the rule which has been pronounced by my Lord CHIEF BARON, but think it right to state expressly the grounds upon which I concur in that rule. Before the statute of the 7 Geo. 2, c. 5, *Ir.*, this court and the other superior courts in Dublin exercised, under certain regulations, the power of admitting attorneys as their own officers, to discharge the duties of the respective courts. It was thought right, however, by the legislature, that certain rules should be laid down by legislative enactments, reserving to the superior courts the power of exercising their original jurisdiction in such cases as, in their discretion, it might seem fit so to do. The 7 Geo. 2, c. 5, *Ir.*, enacts, that no person shall be admitted an attorney who shall not have served, for a period of five years, the master to whom he should be bound. Some years after the passing of this act, another act was passed in England, for the purpose of regulating the admission of attorneys there.\* The latter is an act comprising a variety of subjects, but the 8th section prescribes the period of service in the case of attorneys, and requires that every person bound an apprentice to an attorney or solicitor shall, during the *whole time* of service therein specified, continue and be actually employed by such attorney or solicitor. Now, although the words of the English act may, perhaps, more fully point out and

\* The 22, G 2 c. 46, Eng.

prescribe the manner of service than the words of the corresponding Irish act, yet, in my opinion, the same legal construction is to be put upon both. I, therefore, think that any person who seeks *de jure* to be admitted an attorney of the Irish courts must have served an apprenticeship for the *whole* term of five years; and further, must have served, during the entire of that period, the master to whom he was bound. Service to no other person than the master would, in my opinion, be sufficient, even though it were to a person more competent than the master himself to instruct the apprentice in a knowledge of his profession. If we were, therefore, to rest on the 2d section of the Irish act, taking into account the decisions on the corresponding English act, and considering the objects which the legislature had in view in passing these acts, I should be of opinion, that it was not in the power of this court to admit the present applicant to be an attorney. But the 9th section of the Irish act reserves a power to the court of admitting or rejecting, according to its ancient discretion, *even after a service of five years*, a person applying to be admitted an attorney. This, however, is to be a sound discretion, and not to be exercised capriciously, or to be considered as the whim of the court. The case of Mr. Lyons formerly came before this court, at a time when neither my LORD CHIEF BARON nor my brother RICHARDS was on the bench. I remember it was then argued very much on the strict law of the case. It was pressed on the court by Mr. Lyons's counsel, that a service to a Six-clerk was tantamount to a service to an attorney, and that service to an attorney, though not the master, was a sufficient compliance with the provisions of the statute. The court was of opinion that it was not such a service as the statute required, and of that opinion the court still remains. On the other hand it was urged, on that occasion, that we ought not to exercise our discretion in favor of Mr. Lyons's admission, and we were told that our acceding to that application would open a door to many applications of a similar description. Perhaps the case was not very much pressed on that ground, as Mr. Lyons had at that period a salary of £250 a year for his services in the Six-clerk's office, which salary he would have been obliged to relinquish had he been admitted an attorney of this court. The court did not, on that occasion, think proper to exercise its discretionary power for the admission of Mr. Lyons. At the time of his application to the Lord Chancellor, in 1838, the situation of things was very much changed:—the office of Six-clerk had been abolished:—the danger of the case being drawn into a precedent had been very much lessened, and his salary had dropped. Under these circumstances, the Chancellor, who was well acquainted with the nature of the duties performed in the Six-clerk's office, approved of this gentleman as a competent person to be admitted a solicitor; and, accordingly, I presume, in the exercise of the discretionary power vested in him by the

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9th section of the 7 Geo. 2, thought proper to admit him. If that were the ground of the Chancellor's decision, I am happy in feeling myself at liberty to follow his example; but, if the ground of the Chancellor's decision were that the service of Mr. Lyons was a compliance with the act of parliament (with all the respect which I unfeignedly feel for any of his Lordship's decisions), I could not bring my mind to accede to such a proposition, thinking, as I do, that such a service was not a sufficient compliance with the act of parliament. Under all the circumstances of Mr. Lyons's case, being satisfied of his fitness, and considering the altered state of things; that the office of Six-clerk has been abolished; and, moreover, that a Judge of the superior courts has decided in favor of his admission, I think we ought to follow that example; protesting, however, against the present case being drawn into a precedent on any future occasion.

His Lordship added that he had been authorised by Baron FORTESCUE to state that he fully concurred in the propriety of admitting Mr. Lyons, and also in the grounds of that admission.

RICHARDS, B.—Concurring as I do, in the rule pronounced by the other members of the court, I think it right, merely to add, that this is not, in my opinion, the case of a service pursuant to the terms of the act of parliament. I therefore think, that were Mr. Lyons to stand upon his claim to be admitted as of right, we ought to refuse his application; but on the special grounds stated by the court, I think that in justice to this gentleman, we ought not to exclude him. I also fully concur in the propriety of the declaration, that this case is not to be drawn into a precedent, but that for the future, the provisions of the statute are to be strictly adhered to.

† That learned Baron was present during the argument, but was presiding at *Nisi Prius*, when the court gave judgment.

*Tuesday, February 5th, 1839.*

#### PRACTICE—CREDITOR'S SUIT—COSTS.

GRAY v. CRAWFORD.

By the settled practice of this court, the plaintiff in a creditor's suit is only entitled to his costs, according to the priority of his demand.

Mr. BREWSTER, Q. C., with whom was Mr. Henry Joy, on behalf of the plaintiff, moved (amongst other things) that the Accountant-General should draw on the bank, in favor of the plaintiff, or his attorney

lawfully authorised, for the sum of £136. 3s. 7d., being the amount of the plaintiff's taxed costs under the decree in this cause, &c.

The bill in this case was filed by the plaintiff to foreclose a mortgage. Under the decree to account, a charge had been filed by a prior judgment creditor, on whose behalf Mr. *Robert Andrews* opposed the present motion.

It was admitted that the fund was insufficient to pay the whole judgment debt, if the plaintiff's costs of suit were first deducted.

On the part of the plaintiff it was urged that, in the present case, there was this peculiarity, that the cognuzor of the judgment was still alive, and that, therefore, the judgment creditor could not have brought the premises to sale except by the intervention of the plaintiff (the sole mortgagee); that the judgment creditor had come into the office, and availed himself of the decree obtained by the plaintiff, and that even if he had been himself in a situation to file a bill and bring the premises to sale, the costs of such suit must have been deducted from the produce of the sale; so that he would be in no worse situation were the attorney for the present plaintiff, in the first instance, to be paid the costs of the suit out of the fund in court. That this, moreover, was not a case in which there could be any "race," as it was called, between the parties, who should first institute the suit, for the judgment creditor could institute none while the cognuzor of the judgment was alive. It was further contended, that, according to the practice of this court, the party who, by filing a bill, made the fund available, was invariably entitled to his costs.

PENNEFATHER, B.—According to my recollection, the practice has been quite otherwise. A puisne creditor ought not to be allowed to damnify a prior creditor, by being the first to institute a suit against the debtor, nor ought the court to hold out a temptation to creditors, or those concerned for them, to engage in a scramble for suits, such as would take place, if the parties who were the first to commence proceedings were certain of getting their costs. The court ought not to hold out an inducement of that kind, which would have the effect of taking money out of the pockets of prior creditors. A distinction, indeed, exists with respect to those cases wherein the fund consists of personalty, which is scattered, and not tangible in its nature. In such cases, a puisne creditor, who, by his exertions has made the fund available, has been considered as a sort of salvage creditor, and, as such, has been held entitled to his costs, without reference to the priority of his demand, but, beyond that, I conceive the rule does not extend. In the court of Chancery, the practice in this respect has been somewhat fluctuating;\* but, in this court,

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\* See the case of *Peyton v. the court of Chancery*, and reported *McDermott*, recently decided in *1 Drury & Walsh*, 234, where

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no such fluctuation has taken place, at least for many years in the practice. In Michaelmas Term last, a case came before me when sitting alone, in which a question arose as to certain post costs claimed by the plaintiffs, consisting of the costs of making out title after the decree. As they had been incurred for the benefit of all parties, I was of opinion that the plaintiff, by whom they had been paid, ought to be reimbursed to the extent of the sums he had expended.†

CHIEF BARON.—I think it is a sound principle of practice, that a party should not be invited or encouraged to take up a suit in which he has no further interest than the accumulation of costs. It is most desirable that a party who takes up a suit should be interested in husbanding the fund to be thereby realized; whereas, if a puisne creditor were at liberty to institute a suit with a certainty of getting his costs, the cause would inevitably, in case the fund were to prove deficient, be abandoned to the mercies of those whose sole interest it would be to increase to the utmost the amount of costs.

Motion refused, so far as it related to the costs

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 Thursday, February 7th.

#### PRACTICE—COSTS—ASSIGNEE OF INSOLVENT.

CONLAN v. JACKSON.

As a general rule, the assignee of an insolvent, when defendant in a suit, is not entitled to his costs.

Bill filed to raise the arrears of an annuity. The defendant was the assignee of the grantor of the annuity, who had been discharged as an insolvent.

The defendant had appeared and answered, and counsel on his behalf, at the hearing of the cause, applied for his costs—

the several variations which have taken place in the practice of that court, with respect to costs, are thus stated by the Lord Chancellor:—  
 “Formerly, the plaintiff got his costs without any reference to the priority of his claim. During the time of Lord Manners, the practice was different, and the plaintiff was decreed to be paid his costs according to the order and degree of his debt. This was

“again changed by Sir Anthony Harte; but, since that period the practice which prevailed in the time of Lord Manners has been restored, and universally acted upon.” See, also, the case of *Taylor v. Gorman*, id. 235. n.  
 † The case to which his Lordship here alludes is *The Executors of Maguire v. Dundass*, which see, ante, p. 25.

But the COURT refused the application, stating it to be contrary to the practice in such cases, to give the assignee his costs.\*

\* NOTE. It has been held accordingly, that the assignees of an insolvent mortgagor are not entitled to their costs in a suit for foreclosure, *Collins v. Shirley*, 1 R. & M. 638; *Barry v. Wray*, reported in Beames on Costs, p. 392. But where, in such cases, the *provisional* assignee has been made a defendant it has been held in England, that he is entitled to his costs from the plaintiff, who has been allowed to add them to the principal and interest due to him on the mortgage. See *Peake v. Gibbon*, 1 Taml. 505; *Woodford v. Haddora*, 4 Sim. 606; *Mountford v. Scott*, 3 Mad. 40. The distinction seems to be founded upon the circumstance of the provisional assignee being made a party to the suit in his public capacity.

In the following case, which came before the court in last Michaelmas Term, the plaintiff, under the special circumstances therein mentioned, was allowed the costs of appointing an assignee for the purposes of the suit:—

#### EQUITY EXCHEQUER.

Tuesday, Nov. 27th, 1838.

#### COSTS—ASSIGNEE OF INSOLVENT MORTGAGOR.

MAXWELL v. SCANLON and others.

Mr. Cooper, Q. C., on behalf of the plaintiff, moved that the Accountant-General should, out of the cash in bank to the credit of the cause, draw, in favor of the plaintiff, or his attorney lawfully authorised, for the sum of, &c., being the taxed costs of the defendant, C. Fogarty, together with the costs of this motion.

This was a foreclosure suit.

By the affidavit of the plaintiff's attorney, made in support of the

motion, it appeared that one of the defendants, who was entitled to a portion of the mortgaged premises, having been discharged under the insolvent act, his assignee was made a defendant in the cause. The assignee filed his answer, but died after the rule for publication had passed, whereupon the deponent, for the purpose of expediting the hearing of the cause, and avoiding the risk of a further abatement, applied to Fogarty, a creditor of the insolvent's and requested him to undertake the office of assignee. This Fogarty refused to do, without an undertaking, on the part of the deponent, for the payment of his costs, which undertaking was accordingly given. Fogarty, having been thereupon appointed assignee, was made a defendant in the suit. The affidavit then went on to state, that Fogarty's appointment had been the means of expediting the hearing of the cause, whereby there had been a saving to the fund, by preventing an accumulation of interest on the plaintiff's demand (which was considerable), and by obviating the expense and delay of bringing the cause to a hearing upon sequestration. The affidavit further stated, that Fogarty was the only one of the insolvent's creditors who could be prevailed on to accept the office of assignee.

*Per Curiam*.—We think it reasonable that the plaintiff should have the costs for which he now applies. They seem to be analogous to the costs incurred by a plaintiff in raising a personal representative in the Prerogative Court. Therefore,

Grant the motion.

In reference to the last case, it may be observed, that in the

The assignee of an insolvent mortgagor having died in the progress of a foreclosure suit, another creditor consented to accept the office of assignee, and permit himself to be made a defendant in the cause, on the terms of the plaintiff undertaking for the payment of his costs; an undertaking to that effect having been accordingly given by the plaintiff, for the purpose of expediting the suit, and thereby saving expense to the fund:—

*Held*, that the plaintiff was entitled to be paid such costs out of the fund in bank to the credit of the cause.

**EQUITY EXCHEQUER.****GENERAL ORDER—LISTING NOTICES OF MOTIONS—  
PRACTICE.**

Monday, the 4th day of February, 1839,

IT IS THIS DAY ORDERED BY THE COURT, that from and after the first day of next Easter Term, all Notices of Motion be lodged in the Office of the Register on the day after the service thereof, and that the Register do make a list of such Notices moveable on each Motion day, according to their dates, and that each day's Notices be disposed of and discharged before Notices of a subsequent date, unless the Court shall, in any instance, see fit otherwise to direct; and in default of lodging with the Register a copy of any Notice of Motion in manner hereinbefore directed, IT IS FURTHER ORDERED, that such Notice shall not be moved, and that the party or his attorney, on whose behalf such Notice shall be served, shall be liable to such costs upon the discharging of such Notice as the Court shall be pleased to direct.

STEPHEN WOLFE.  
RICHARD PENNEFATHER.  
J. LESLIE FOSTER.  
JOHN RICHARDS.

GERALD TENCH, *Register.*

# CASES

## IN THE

### COURTS OF CHANCERY, ROLLS, AND EQUITY EXCHEQUER.

#### CHANCERY.

*Saturday, February 9th, 1839.*

#### SPECIFIC PERFORMANCE—STATUTE OF FRAUDS— REMAINDERMAN.

LOWRY v. Lord DUFFERIN.

Suit for specific performance.

The bill stated, that the late Lord Dufferin had agreed with the defendant to execute certain leases for lives renewable for ever, of two plots of ground in the town of Killaleagh, in the county of Down.

Several grounds of defence were relied on. The questions discussed at the hearing were:—First: Whether the owner of the inheritance was not a necessary party. This point was not much pressed.

Secondly—Whether, upon the facts as proved, there was a sufficient *signing* within the statute of frauds.

Thirdly—Whether the contract with tenant for life was of such a nature, that it could be enforced against the remainder-man.

Fourthly—Whether the circumstance that the remainder-man took his remainder, as a purchaser for valuable consideration, made any difference in his liability to execute the contract of the tenant for life.

Fifthly—Whether the plaintiff, not having performed his part of the contract, could insist, under the circumstances, on specific performance.

It appeared that, under a family settlement, dated in 1825, the late Lord Dufferin, the brother of the present defendant, was tenant for life of the family estates, with power to make leases for lives renewable for ever of certain portions of the property. The present Lord Dufferin, under the provisions of that settlement, was entitled to an estate in remainder, in default of issue of the late Lord, who died without issue. This deed appeared to have been made for the *settlement of disputes* between different members of the Dufferin family, and it was by this arrangement

Tenant for life agrees to grant a lease for lives renewable for ever, having a power to make such leases, and dies. The remainderman will be decreed to execute the contract, tho' he took his remainder as a purchaser for valuable consideration, p. 287.

But if the contract were by parol, and partly performed, so as to take it out of the statute of frauds, tho' the tenant for life would have been decreed to execute it, yet, it seems it cannot be enforced after his death, against the remainderman—*obiturdictum*. p. 287.

A written notice, signed,

referring to a written proposal, *not* signed and made several years before, may be so connected with it, as to render the two documents a contract, within the statute of frauds, sufficiently signed.

Whether the owner of the inheritance is a necessary party to a suit against tenant for life, for specific performance of an agreement for a lease for lives renewable for ever.—*Quere.*



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that the power above referred to, of making leases for lives renewable for ever, was given to the tenant for life. The present Lord Dufferin, under these circumstances, claimed to be a purchaser for valuable consideration under the provisions of that deed.\*

The two tenements in question were a part of the property over which the late Lord Dufferin had power, by the settlement of 1825, to make leases for lives renewable for ever.

The material transactions between the late Lord Dufferin and the present plaintiff appeared to be as follows:—

Two *proposals* for leases were written and signed by the plaintiff only. The first of these proposals was in these words:—

"I John Lowry, of Killileagh, do propose to pay to the Right Hon. Lord Dufferin and Clanboye, the clear yearly rent or sum of £15 sterling, for a lease of lives renewable for ever, of that house and tenement in Cross-street, in the town of Killileagh, late in the occupation of James Moorhead, together with the vacant ground in Shore-street, adjoining the said tenement, and extending therefrom to the tenement at present occupied by Mathew Keown; and I also engage to build thereon six dwelling-houses agreeable to the annexed plans, the same to be 18 feet high in the side-walls, roofed with foreign timber, and slated; the said houses to be built and completely finished within one year from the date hereof.—Given under my hand, this 31st day of December, 1828. "JOHN LOWRY."

The other proposal, related to another plot of ground situate in Back-street," where *five* houses were proposed to be built. It was in the same form as the first, and was dated the same day.

The above proposals were received by the late Lord Dufferin, who retained them in his possession. The plaintiff, immediately after the date of those proposals, entered into possession of the premises, and the bill charged, that the late Lord Dufferin *agreed* to execute leases according to the terms therein proposed.

The plaintiff commenced building on the premises comprised in the first proposal, and erected there *seven* houses, 20 feet high, thus going beyond, and varying from the terms in the proposal. These houses, however, under the circumstances mentioned hereafter, remained in an unfinished state up to the time of the filing of the bill.

The plaintiff did not commence building any houses on the tenement in Back-street, described in the second proposal.

\* Other provisions of the deed of 1825 were stated in the argument, to shew that the defendant took under that deed, as purchaser for valuable consideration. The deed was excessively voluminous, and the cause stood over for several days, in order that counsel for both parties might have an opportunity of ascertaining its contents. Finally, the Lord Chancellor assumed it as conceded, that Lord Dufferin took as a purchaser for valuable consideration under that deed.

Nearly five years after the date of the above proposals, the following written notice was served on the plaintiff:—

"Whereas you heretofore entered into an agreement with me, viz., "on or about the 28th day of December, 1828, for a lease for lives renewable for ever, subject to the yearly rent of £15 sterling, and the covenants and clauses usual in renewal leases on my estate, of all that house and tenement in Cross-street, in the town of Killileagh, then late in the occupation of James Moorhead, together with the vacant ground in Shore-street, adjoining said tenement, and extending therefrom to the tenement then occupied by Mathew Keown; and by the same agreement, you engaged to build thereon six dwelling-houses, agreeable to the plans thereto annexed, the same to be 18 feet high in the side walls, roofed with foreign timber, and slated; the said houses to be built and completely finished within one year from the date of the said agreement. And whereas you entered into possession of said premises, and paid rent under said agreement, but no lease has yet been prepared or tendered to me, nor have the houses before mentioned been completed, and there is now one year's rent in arrear of the said premises at the 1st day of May last. Now, I do hereby require you, within one month from the date hereof, to pay to me, or my agent, Arthur Hill Read, Esq., at his office in Killileagh aforesaid, the rent now due and in arrear as aforesaid, and to furnish me or my said agent a draft of a lease, pursuant to the aforesaid agreement, in order that the same may be examined on my behalf, and, when approved of, returned to you for being engrossed and executed by you, and, with a counterpart thereof, afterwards tendered for my signature. And take notice, that if you do not comply with the terms of this notice, I shall consider myself discharged from the aforesaid agreement, and will take such proceedings as I may be advised necessary to evict your interest in the same premises, and for recovery of the rent arrear.—Dated this 23d day of September, 1833.

(Signed)

"DUFFERIN AND CLANBOYE."

The above notice was signed by the late Lord Dufferin. It referred to an agreement made "on or about the 28th December, 1838," the actual date of the proposals being the 31st December, 1828. It was conceded, however, that this was merely an error of date, and the identity of the proposals of 1828 was not disputed. The above notice related only to the Cross and Shore-street tenement comprised in the first proposal, and was entirely silent as to the tenement in Back-street.

The plaintiff served the following notice in reply:—

"In compliance with your notice, dated the 23d September last, I herewith send you the draft of a lease of the premises in Cross-street and Shore-street, according to the terms of my agreement with you on the 28th December, 1828, which, when approved of on your

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"part, shall, with a counterpart for you, be engrossed on the proper stamps, and executed by me immediately after. I have also herewith sent the sum of £15 for one year's rent of said premises, due on the 1st May last.—Dated this 21st day of October, 1833.

"JOHN LOWRY."

Disputes ensued as to the covenants to be inserted in the lease. Lord Dufferin insisted on clauses against alienation or sub-letting, without licence of the landlord, and furnished a printed form of lease, in use on his estate. The plaintiff refused to insert these clauses, as being inapplicable to building leases renewable for ever, and tendered leases for execution which did not contain them, and which Lord Dufferin refused to execute.

In October, 1833, Lord Dufferin served the plaintiff with notice to quit, but no further proceedings were then taken, and Lord Dufferin afterwards accepted rent up to November, 1833. Finally, notice to quit was again served on the plaintiff in 1835, and before the six months expired, Lord Dufferin died.

The present defendant then entered into possession as remainder-man, under the deed of 1825. Since his accession to the property, the plaintiff tendered to him for execution the same leases which the late Lord had declined to execute. The defendant returned no answer, and in October, 1836, he brought ejectments for the recovery of both tenements. The plaintiff took defence, but afterwards gave a consent for judgment in both ejectments, with a stay of execution.

It appeared that the value of the unfinished houses, built on the *Shore* and *Cross-street* tenement, was about £700, and that the plaintiff had expended a further sum on woodwork, which was partly prepared but had not been put up. No houses or buildings of any sort had been erected on the tenement in *Back-street*.

The bill was filed on the 20th of April, 1837, stating, that the late Lord Dufferin had, on or about the 28th December, 1828, agreed to execute to the plaintiff leases for lives renewable for ever, and praying specific performance and an injunction.

The cause had been set down for hearing, and was on the list in November last, but, no one appearing for the plaintiffs when the cause was called on, the bill was dismissed.

The cause now come on for a re-hearing.

Messrs. *Warren*, Q. C., *Gilmore*, Q. C., and *Lowry*, were counsel for the plaintiff, and Messrs. *Pennefather*, Q. C., *W. Brooke*, Q. C., *Holmes* and *Hamilton*, for the defendant.

The plaintiff's counsel, in the course of the argument, gave up the case as to the tenement in *Back-street*.

The arguments for the plaintiff as to the tenement in *Cross* and *Shore-street*, were chiefly as follows:

1. The written proposal of 1828 having been accepted, possession having also been given at the time, and £900 having been laid out in building, on the faith of the promise, the case is taken out of the statute of frauds, and the contract will be enforced, though the proposal is not signed by the other contracting party.

2. If the above argument were doubtful, the notice of September, 1833, removes the doubt. That notice is *signed* by the late Lord Dufferin, and though not in form a contract, it refers to an 'agreement' as in existence, and in such terms, as to identify the agreement with the proposal of 1828. This is a sufficient *signing* to satisfy the statute of frauds, *Clinan v. Cooke* (a); *Smith v. Watson* (b); *Welford v. Beasley* (c). The case, therefore, rests upon a written contract, and is independent of the doctrine of part performance.

3. It is no answer to say, that the late Lord was tenant for life, and the present defendant remainder-man under the settlement of 1825. Because, taking this as a *written* contract by the tenant for life, to execute his leasing power in favor of the plaintiff, it is independent of the doctrine of part performance, and may be enforced against the remainder-man, *Shannon v. Bradstreet* (d); *Blore v. Sutton* (e). And it makes no difference whether the remainder-man is a purchaser for valuable consideration, under the settlement of 1825, or not; for he takes his remainder, subject to the power of leasing in the tenant for life.

4. Nor is it an answer to say, that the plaintiff has not built within the year, and, consequently, not having performed his part of the contract, cannot enforce it. Because, under the terms of the agreement, the building is not a condition precedent. The covenants are mutual and independent. A breach by one party would entitle the other to compensation, but will not exonerate him from performing his part; it is so at law, *Ritchie v. Atkinson* (f). Even where the words actually import a condition precedent, they will be construed as mutual covenants, *Booth v. Eame* (g). Unless the *laches* amount to fraud they will not disentitle to relief in equity, *Tramp v. Dwyer* (h), and where *possession* goes with the contract, the *laches* will not disqualify, *Crofton v. Ormsby* (i).

5. On an equitable interpretation of the proposal of 1828, and the notice of September, 1833, the plaintiff was entitled to a year, from the date of the notice of 1833, to complete his building. True, he did not do so: but that was occasioned by the hostile attitude assumed by Lord Dufferin before the year expired. It would have been rash in the plain-

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Arguments  
for the plain-  
tiff.

(a) 1 Sch. & Lef. 33.

(c) 3 Atk. 53.

(e) 3 Mer. 247, per Sir W. Grant.

(g) 1 Hen. Bl. 273 n.

(i) 2 Sch. & Lef. 603.

(b) Bunb. 55.

(d) 1 Sch. & Lef. 52.

(f) 10 East 294.

(h) 2 Bligh N. S. 11.

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Arguments  
for the de-  
fendant.

The arguments for the defendant were chiefly the following :

1. If this be pressed as a case of part performance, however valid it might be, against the late Lord Dufferin, it is not available against the remainder-man. Because, the doctrine of part performance is founded on the fraud of a party permitting another to lay out money on the faith of a contract, which he then refuses to execute. But the fraud of a tenant for life cannot be visited on an innocent remainder man. *Symonds v. Powell* (a) ; *Ex parte Smith* (b).

2. Supposing that the notice of 1831, being taken with the proposal of 1828, there is a sufficient *signing* within the statute of frauds: still the plaintiff is disentitled to relief, not having performed his part. Taking it as strongly as possible for the plaintiff, the proposal was accepted, with certain qualifications, viz : that the houses should be built on a certain plan, which has been departed from—within a year; yet, ten years have elapsed—that the lease should contain covenants usual on Lord Dufferin's estate, which include those against alienation or subletting without license: these the plaintiff has refused to insert. Therefore, not having performed his part of the contract, he is incapacitated from enforcing it, *Harnett v. Yielding* (c). To do so, he must come with perfect propriety of conduct, *Horan v. Mostyn* (d) ; *Knatchbull v. Groover* (e).

3. The case rests on the same principles as where a landlord proceeds, at law, to evict the lease of a tenant, for the breach of a covenant to repair or to insure. If the tenant has not repaired or not insured according to his covenant, this court will not relieve him from the forfeiture, *Hill v. Barclay* (f) ; *Saunders v. Pope* (g) ; *Bracebridge v. Buckley* (h) ; *Reynolds v. Pitt* (i).

Judgment.

Lord CHANCELLOR—(After condemning, in very strong terms, the conduct of the defendant, who, pending the petition for a re-hearing, had executed his *habere* at law and gone into possession) proceeded to give judgment:—The first question raised in the case is on statute of frauds; and it is urged, that part performance cannot take the case out of the statute, as against a remainder-man. This case, however, does not rest on part performance. Here is a document, amounting to a written agreement by the tenant for life, and signed by him. The notice of September, 1833, begins in these words: "Whereas you heretofore entered into an agreement with me."—Now if Mr. Lowry

(a) 6 Mad. 207, 214.

(l) Swan. 307.

(c) 2 Sch. & Lef 553-4.

(d) 6 Ves. 472.

(e) 3 Mer. 124.

(f) 16 Ves. 4 2. (finally reported in 18 Ves. 56.)

(g) 12 Ves. 282.

(h) 2 Price, 200.

(i) 2 Price, 212, and 19 Ves. 134.

entered into an agreement with Lord Dufferin, Lord Dufferin must have entered into an agreement with Mr. Lowry; and, though there seems to be a mistake in the date, 28th December, 1828, being put for 31st Dec. yet, I think this notice can refer to no other than the proposal of that date. If there existed any other, that might be shewn on the part of the defendant. [His Lordship stated the remainder of the notice.] Now what is it that Lord Dufferin required Mr. Lowry to do, by this notice? He does not call upon him immediately to build: he calls for draft leases to be furnished, containing the usual clauses; and he says, if the terms of this notice are not complied with, he will consider himself discharged of the agreement. Then, if the terms of the notice *are* complied with, he is not discharged. Afterwards, a draft is tendered on the part of Mr. Lowry, in compliance with the notice; it lay upon Lord Dufferin to say why he did not approve of that draft.

But, throughout the transactions which took place, it was not the delay in the building that was the cause of dispute. The thing that has been specified is the non-alienation clause, which is required by Lord Dufferin, and objected to by Mr. Lowry. If the defendant has any case, it is, that Mr. Lowry refused to insert clauses against alienation and sub-letting, which, it is insisted, are "usual clauses" on Lord Dufferin's estate; and, that the document relied on by plaintiff binds him to the clauses usual on the Dufferin estate. But the proof is most imperfect, to shew what is the usual form of lease, when it is to be a *renewable* lease, and where *six* houses are to be built. It is not shewn, that there is any established custom in such cases. It is insisted, that these clauses should be inserted, prohibiting alienation or sub-letting without consent in writing under the hand and seal of the landlord. It is not for me to say whether that would be a reasonable thing. If he wished to establish a thriving town, it was a very mistaken way to set about it. No person will spend their money, if they are to be subject to the caprice of a third person, to such an extent that they can neither dispose of the houses nor let them when they are built, without the license of the landlord. A non-alienation clause does not come under the description of usual covenants in ordinary cases. I don't think there could be any usual form applying to this case, where the lease was to be in perpetuity, and a number of houses were to be built. However, if that were the agreement between the parties, I have no right to control it.

As to the deed of 1825, it is immaterial whether Lord Dufferin, under that deed, be a purchaser for valuable consideration or not. If the agreement is not taken out of the statute of frauds, he is not bound, whether he is a purchaser for valuable consideration or not. If the agreement *is* taken out of that statute he *is* bound, whether he is a purchaser for valuable consideration or not.

As to Back-street, there is nothing so far as those premises are con-

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cerned, to take the case out of the statute of frauds ; and I must, therefore, dismiss the bill, so far as relates to those premises. I shall make a decree for specific execution of the agreement as to the Shore and Cross-street tenement, and refer it to the Master to settle the lease. I am disposed at present to declare that in settling the form of lease, no clauses against alienation or subletting are to be inserted, but I will consider that further.

*Friday, February 15th.*

LORD CHANCELLOR—I have been considering this case, and I think some alterations from what I expressed yesterday are necessary in the decretal order.

I shall declare the plaintiff, as to Cross-street, entitled to the benefit of the agreement mentioned in the notice of September, 1833, which refers to an agreement as of the 31st December, instead of the 28th December, which was the actual date of the proposal. The mistake as to the date must be referred to in the decretal order. I will not, at present, make any more positive declaration as to the terms of the agreement than as they appear on the face of those two documents. But I shall refer it to the Master, to inquire whether there is any usage on Lord Dufferin's estate with regard to renewable leases for building purposes, as to inserting in such leases clauses against alienation and subletting ; and, if there be any usage as to such leases, to report what it is.

*Reg. Lib. fol. 122.*

As to premises in Cross-street and Shore street, decree specific execution of the agreement mentioned in the notice of the 23d September, 1833, (which refers to said agreement, as of the 31st December, instead of the 28th December, 1828,) and refer it to the Master to settle the form of lease pursuant to such agreement, and refer it further to the Master to inquire and report whether there was any and what usage on the defendant's portion of the Killileagh estate, previous to the date of said agreement, with regard to the insertion in building-leases, or in leases for lives renewable for ever, of the nature in said agreement mentioned, of covenants against alienation or sub-letting ; and, if there has been any such usage, to report the same accordingly. And as to the premises in Back-street, dismiss bill with the costs incurred by the defendant in relation thereto ; but, in the taxation of such costs, let the Master disallow all costs incurred by the defendant after the service of the notice on his solicitor, bearing date, 6th day of December, 1838. Reserve the consideration of the costs of the rest of

the suit, and of all further directions, until after the return of the Master's report, and let an injunction forthwith issue to restore the plaintiff to the possession of the premises in Cross-street and Shore-street.

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Wednesday, January 23d.

COUNSEL AND CLIENT—INCAPACITY TO PURCHASE.

CARTER v. PALMER, and PALMER v. CARTER.

Mr. CARTER, an English barrister, brought a bill to raise a charge out of Sir William Palmer's estates, Sir William resisting it, on the ground that Carter had been his confidential counsel, and had purchased the charge from one Mackmurdo, in violation of professional duty, whilst a negotiation for a compromise was pending between him and Mackmurdo.

The mode in which the charge in question was originally created, and the manner in which it became vested in Mr. Carter, were as follows :—

Roger Palmer, by his will, dated 20th April, 1801, devised all his real estates, in Great Britain and Ireland, to the use of his sister, Mrs. Budworth Palmer, for life, and, after her decease, to the present Sir William Palmer, for life, with remainder to his first and other sons in tail.

On the death of Roger Palmer, in 1801, Mrs. Budworth Palmer entered into possession, as tenant for life, under her brother's will.

Sir William Palmer, the plaintiff in the cross-bill, being thus entitled to a life estate in remainder, after the decease of Mrs. Budworth Palmer, in 1816 executed the securities in question.

Those securities consisted of a bond and warrant to confess judgment, and an indenture of covenant of even date. The bond was in the penal sum of £8,000, and was conditioned for the payment of £2,663. 19s. 6d., with interest, and all sums to be paid for insuring Sir William Palmer's life. The condition of the bond recited, that Sir William Palmer lately carried on business with A. Oswald and G. Howell, under the firm of Oswald and Co., who, in the course of their business, had become justly and truly indebted to Richard Wilson Sheppard and Edward Longdon Mackmurdo, theretofore his partners, in various sums of money, amounting to the principal sum of £2,663. 19s. 6d., besides interest; and also recited, that Richard Wilson Sheppard was solely entitled to the debt and interest. By the deed of covenant, Sir William Palmer covenanted that, immediately on the decease of Mrs. Budworth Palmer, he would do all other reasonable acts, for the better and more perfectly charging

A counsel, who has been professionally consulted with relation to an outstanding demand which his client is seeking to compromise, will not be suffered afterwards to buy up such outstanding demand, though the relation of counsel and client has ceased. And if a counsel makes such a purchase, it will be held a trust for his former client.

*Post obit securities executed in 1816, by Sir William Palmer.*



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the said estates with the said principal sum of £2,663. 9s. 6d. interest, and premiums of insurance. And it was thereby, among other things, provided, *that in case it should thereafter appear that any mistake had been made in the amount of the said debt, and that the balance due should be found to be less than was stated in the accounts rendered*, the said deed and bond and judgments were to be securities *for so much less as the real balance should be found to be*, together with interest thereon, and such other sum and sums of money for insurance and interest and costs, as aforesaid.

*Securities of  
1816 became  
vested in E. L.  
Mackmurdo.*

A commission of Bankrupt, dated 12th February, 1817, issued against Richard Wilson Sheppard, under which he was declared a bankrupt; and, by indenture of 10th March, 1820, his assignees (in pursuance of a resolution of the creditors) assigned to Edward Longdon Mackmurdo the bond of 31st July, 1816, and the monies secured thereby, together with the said indenture of covenant, and all other deeds and securities relating to the monies secured thereby.

In Hilary, 1820, judgment was entered up in the King's Bench in Ireland, under the warrant of attorney, for £8,000 and costs.

At the time of the execution of the securities, Sir William Palmer appeared to have been possessed of little property in possession, and the holder of the securities looked to Sir William's life estate, expectant on the decease of Mrs. Budworth Palmer, as the only probable source of payment. Sir William was in embarrassed circumstances, and resided abroad (generally at Bruges, in the Netherlands), from the year 1815 till after the death of Mrs. B. Palmer in 1832. Mr. Carter was first engaged or retained, as his counsel or legal adviser, in 1820. About the year 1824, Mr. Carter visited Sir William at Bruges, chiefly for the purpose of consulting with Sir William, and taking instructions for the re-settlement of the estates in Ireland, to which Sir William would become entitled for his life, after the death of Mrs. B. Palmer, and also for the purpose of consulting on the arrangement of his affairs generally. The deed of settlement then contemplated was afterwards prepared, under the advice of Mr. Carter, who became generally conversant in all Sir William Palmer's affairs.

*Carter be-  
came Sir W.  
Palmer's  
counsel in  
1820.*

*Treaties  
under advice  
of Carter, for  
compromising  
securities of  
1816.*

It also appeared that treaties had been carried on, with the knowledge, and under the advice of Mr. Carter, for compromising the claims and demands on foot of the securities of 1816, which were now in question. These negotiations commenced about the year 1824. E. L. Mackmurdo was then the holder of those securities. Mr. Carter was professionally consulted with relation thereto, and he verbally gave his opinion, that he thought it very doubtful whether Mackmurdo could recover the amount claimed by him on foot of those securities, but recommended a compromise to be effected, if possible.

It was accordingly proposed to Mackmurdo, on behalf of Sir William

Palmer, to give him a *post obit* bond, payable in six months after the death of Mrs. B. Palmer, for the sum of £3,500 or thereabouts, in full satisfaction of his claims. This proposal was not, however, finally acceded to.

The negotiation was renewed in 1827. It was then proposed, on behalf of Sir Wm., to give a charge for £3,570, to affect the Irish estates. In this charge Sir Wm.'s eldest son was to join, whereby Mackmurdo would avoid the contingency of Sir Wm. dying before Mrs. B. Palmer, in which event the securities of 1816 would become valueless. This proposal was at first accepted. A draft of the proposed deed was laid before Mr. Carter, as counsel of Sir William, and he wrote his opinion thereon, as follows:—

"I have perused this bond on behalf of Sir William and Mr. Palmer, but I cannot, as their counsel, approve it. Mr. Mackmurdo's prospect will be greatly improved by the joining of Mr. Palmer, and for that joining, Mr. Palmer, or his immediate friends, must have a substantial consideration. I assume that the £3,570 is the sum which Mr. Palmer has agreed to be surety for; but that sum, and no other, I consider, must be payable on a contingency, viz., Sir William or Mr. Palmer surviving Mrs. Palmer six months. It will be necessary, too, that Mr. Mackmurdo should fully shew his title to the bond and judgments given to Mr. Sheppard; for that bond and those judgments must be released, or assigned in trust for Mr. Palmer, as may be hereafter thought expedient.

"W. P. CARTER, 4, Lincoln's Inn Square,  
21st March, 1827."

Other deeds, for the purpose of the proposed compromise, were prepared and submitted to Mr. Carter, which he settled and approved; but the negotiation, after having been continued from time to time until the year 1831, again broke off, in consequence, it was alleged, of a claim for the costs incurred during the negotiation being made by Mr. Mackmurdo.

A great number of drafts and documents, relating to various affairs of Sir William Palmer, which had been laid before Mr. Carter for advice, were produced in the cause, for the purpose of shewing that he was intimately conversant, in his professional capacity, with Sir Wm. Palmer's affairs.

Mr. Carter continued to be the counsel and legal adviser of Sir William Palmer until August, 1831. About this time, it appeared that Messrs. Lucas and Parkinson, who had been acting as the solicitors of Sir Wm. Palmer, were preparing a deed, by which Sir W. Palmer was to secure the amount of their bill of costs. Mr. Carter had not, it appeared, been paid any fees for his professional services to Sir William Palmer,

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Carter ceased  
to be legal ad-  
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*Purchase by  
Carter for his  
own benefit in  
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and proposed that his fees also should be secured by the intended deed. Some discussion arose on this subject between the parties. Objections were made to the amount and scale of fees claimed by Mr. Carter. Finally, none were paid or secured: and after August, 1831, no professional intercourse took place between the parties.

About the middle of the year 1832, Mr. Carter, being then no longer counsel to Sir William Palmer, proposed to E. L. Mackmurdo to become the purchaser of his claims and demands against Sir William Palmer; and an agreement was made between them for a sale of the securities for the sum of £1400. A written memorandum to that effect was signed between the parties, but Mackmurdo afterwards refused to abide by that agreement, having learned that, two or three days before the memorandum was so signed, Mrs. Bodworth Palmer had been burnt to death in her house in London, the effect of her death being to put Sir William Palmer in possession of the estates, and thereby greatly to raise the value of the securities. It was insinuated that Mr. Carter knew of the death of Mrs. Palmer at the time of this bargain with Mackmurdo; but this was denied by Mr. Carter on his oath, and was a matter in no way affecting the issue between the parties to the present suit.

Whilst matters stood thus between Mr. Carter and Mackmurdo, Sir William Palmer still continued to negotiate with Mackmurdo for a compromise. In the beginning of 1833, meetings of the creditors of Sir William were held, at which Mackmurdo attended. Agreements were submitted to Mackmurdo's solicitor. The solicitor of Sir William deposed in the cause, that he had interviews with Mackmurdo; told him that Sir William would give from £2,000 to £3,000, and Mackmurdo promised to consider the proposal.

However, some time in the year 1833, Mr. Carter, having finally abandoned his first agreement with Mackmurdo, made him another proposal to purchase the securities, offering to give £1000 more than he had previously agreed for. This proposal was accepted, and the securities were accordingly assigned to Mr. Carter for £2,400.

At the time of this transaction, the whole sum appearing due on foot of the securities, for principal, interest, and costs, was about £5,300.

In the month of November, 1833, Sir William Palmer, being ignorant of the purchase of the securities by Mr. Carter, sent over a Mr. Burke with a sum of money to London, for the purpose of effecting a compromise with Mackmurdo, and in that manner became apprised, for the first time, of the sale of the securities by Mackmurdo.

On the 5th April, 1834, Mr. Carter filed his bill in the Court of Chancery here, against Sir Wm. Palmer, stating the will of Roger Palmer, under which, Sir William had become entitled to his estates,

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and stating the execution by him of the securities of 1816, and the purchase by himself of those securities from Mackmurdo; and praying that an account might be taken of what was now due thereon, for principal, interest and costs, and that a receiver might be appointed over Sir William Palmer's estates.

Sir William Palmer put in his answer, insisting—*First*, that the securities of 1816 were originally obtained from him without consideration, for that, in fact, he had never been a partner in the house of Oswald & Co., but, that representations having been made to him, that he had done acts rendering him liable as their partner, accompanied with threats of issuing a commission of bankruptcy, he had executed the securities. *Secondly*, he insisted, that even if he should be held to have been, in point of law, a partner of Oswald & Co., yet, even in that character, he objected to the *amount* of the sum claimed on foot of the securities; the accounts between Oswald & Co., and Messrs. Sheppard and Mackmurdo, having never been fairly adjusted; and he referred to the clause in the deed of 1816, which provided, that the securities should only stand for so much as should be really due. *Thirdly*, he insisted, that the professional relationship between Mr. Carter and himself, with respect to those securities, incapacitated the former from purchasing them, except as his trustee, and accordingly, he offered to repay Mr. Carter the sum of £2,400, which he had disbursed, with interest thereon, but insisted that he was entitled to no more.

Previous to the hearing of the original cause, the sum of £6,158. 8s. 4d. was lodged in court by Sir William Palmer, to abide the event of the suit, in pursuance of an order made to that effect.

The original cause was heard on the 8th November, 1836, when a decree was pronounced, declaring Mr. Carter entitled to £2,400, and interest, according to an offer of Sir William Palmer on 24th December, 1834; thus adopting the view insisted on that Mr. Carter was to be looked on as his trustee.

Mr. Carter appealed from the above decree, and the appeal was heard by the House of Lords on the 15th July, 1837, when their Lordships were of opinion, that Sir W. Palmer could only make a defence of the nature he relied on, by way of cross bill. Their Lordships, accordingly, varied the decree, and directed a reference to the Master, to take an account of what was due on foot of the securities of 1816, without prejudice to any bill which Sir W. Palmer should be advised to file against Mr. Carter.

The cause was remitted back to this court, and Sir W. Palmer, accordingly, filed a cross bill, praying, that it might be declared, that Mr. Carter was not, under the circumstances, competent to purchase the securities of 1816, for his own benefit, and that he might be declared a

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trustee thereof for Sir William, and that Carter might be decreed entitled only to £2,400 (the sum paid by him to Mackmurdo), and interest, and that the remainder of the sum standing to the credit of the original cause, after deducting that sum of £2,400, and interest, might be repaid to Sir William Palmer.

The Master having made his report under the reference directed by the Lords, the original cause now came on for further directions, along with the cross cause.

*Mr. Warren's  
argument for  
Sir William  
Palmer.*

Mr. Warren, Q. C., for Sir W. Palmer.

This is a case of violation of professional duty. These securities were originally questionable; a treaty was on foot to buy up the claim for a small sum. Mr. Carter was the counsel advising Sir W. Palmer, in effecting that compromise. The treaty is prolonged for some time. The counsel steps in and buys up the security himself, behind the back of his client; thus rendering that negotiation abortive, in conducting which, he himself had been the professional adviser. The court must hold him to have bought in trust for his client. Even if the act were done without any bad design, the court would not suffer him to derive an advantage from such a purchase. The principle is, that a professional man shall not derive an advantage from such an act, even if pure in point of intention, *Bulkley v. Wilford* (a); *Segrave v. Kirwan* (b).

It is no defence for Mr. Carter to say, that he ceased to be counsel in August, 1831, and that he did not purchase till 1832. The knowledge that is acquired while the professional relationship exists, incapacitates a barrister or attorney from purchasing the thing in controversy, *Ex parte James* (c); *Chalmondeley v. Clinton* (d); *Hutchins v. Hutchins* (e); *Bulstrode v. Lechmere* (f).

*Mr. Pennefather's  
argument for Mr.  
Carter.*

Mr. Pennefather, Q. C., for Carter.—The cross bill should be dismissed. It is not a bill suggesting errors or mistakes in the account on which the securities of 1816 were founded. I admit there is a general charge of errors, but that will not do. The errors must be specified, *Drew v. Power* (g).

—[LORD CHANCELLOR. If there is a charge of fraud established, that opens the whole account.]—

—These securities were never considered impeachable by Sir William Palmer, or any one for him. They were signed by him after investigation, under the advice of Mr. Matthew O'Reilly, who acted as his counsel and friend on the occasion. The accounts were settled and the ba-

(a) 2 Clark & Finn. 103.

(c) 8 Ves. 337, 249.

(e) 1 Hogan 316.

(b) Beatty 157.

(d) Cooper 86.

(f) Freeman 5.

(g) 1 Sch & L. 192.

lance struck with the greatest care on all sides. The proviso, that if any mistakes should be discovered, they should be allowed for, amounted to nothing more than the phrase, "*errors excepted*." The whole evidence in the cause shews, that there never was an idea by any one of the Palmer family, that the securities were impeachable.

Then, in the year 1833, was it competent to Mr. Carter to become the purchaser? It lies on the other side to shew, that he was incompetent. No doubt, a barrister is bound not to disclose the secrets of his client, but this case is not within that rule. There was here, *no secret*.

It is also a rule, that a professional person shall not take any benefit under an act, in doing which, he himself is the adviser of his client. That was Mr. Kirwan's case (a). He was employed to draw Mr. Daly's will, and he appointed himself executor, not, in fact, knowing the effect as to the residue. Sir Anthony Harte held it a trust. But that rule is also inapplicable to this case. *Mr. Carter never advised any act out of which grew any advantage to himself*. He did not impede the compromise.

I am now going to make an admission which may be thought an important one. I admit, that during the period the relation of counsel and client existed, Mr. Carter could not have purchased from Macmurdo, without the consent of Sir Wm. Palmer. But, that disqualification to purchase was not the result of the law as to professional confidence, but rests on another principle, viz: that *pending a compromise or litigation* of which a solicitor has the management, he cannot purchase for himself the thing in dispute. That is the rule and so qualified in *Hall v. Hallett* (b). The principle with regard to guardian and ward, trustee and *cestui que trust*, attorney and client, only applies whilst the relationship exists, as appears from the cases of *Bellew v. Russell* (c); *Ex parte Lacey* (d); *Hatch v. Hatch* (e). The same principle is recognised in *Lees v. Nuttall* (f). But that case was very different from the present. That was the case of an agent employed to purchase an estate, who, instead of doing so purchased it himself, whilst still the agent of the party.

It is clearly proved in the cause by Sir W. Palmer's own witnessess, that Mr. Carter ceased to be Sir William's counsel in August 1831, and that a Mr. Brewer, from that time, was employed and acted as counsel in the place of Mr. Carter. There was a reason for this change; Mr. Carter had been eleven years counsel to Sir William Palmer, and no complaint of his conduct or advice during that period was ever made,

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(a) Beatty 147.

(c) 1 Eall & Beat. 134.

(e) 9 Ves. 295.

(b) 1 Cox. 135.

(d) 6 Ves. 625.

(f) 1 Russ & Myl. 53.

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but his client never paid him a farthing all that time. Sir William Palmer had been willing to accept of the services of Mr. Carter, but as soon as the propriety of paying up the arrears of fees was suggested, Sir William Palmer said they were exorbitant, and would give nothing.

Mr. Carter was, from that time, at arm's length with his former client. He was then, I contend, at perfect liberty to purchase from Mackmurdo: as much so as any other person in the community. He did not propose any dealings with Mackmurdo till the middle of 1832.

It is attempted to prejudice the present case by imputing to Mr. Carter, that in his first dealing with Mackmurdo, he attempted what would have been gross fraud upon Mackmurdo. It is said that at the time of his first agreement to purchase for £1400, he was aware that Mrs. Budworth Palmer had been burnt to death, two or three days before, Mackmurdo being ignorant of the fact. We have proved as completely as such a fact is capable of proof, that Mr. Carter was as ignorant of the death of Mrs. Budworth Palmer as Mackmurdo himself. Mackmurdo refused to perform that contract and Mr. Carter never insisted on it, both parties having been in fact under a mistake. Fifteen months afterwards they made another agreement for the sum of £2,400, which was carried into effect.

Then, it is said, that Mr. Carter made a proposal to purchase the estates of Sir Wm. Palmer. What has that to do with the questions in this cause? If such a purchase had been completed it might have stood good.

Mr. Smith's  
argument for  
Sir William  
Palmer.

Mr. T. B. C. Smith, Q. C., for Sir W. Palmer. The securities were signed by Sir W. Palmer, under a threat of issuing a commission of bankruptcy, and selling his life estate expectant on the death of Mrs. B. Palmer. If a contingent estate of that nature, which depended on his surviving Mrs. B. Palmer, had been sold under a commission of bankruptcy, it would have brought almost nothing. Under the pressure of this threat, Sir W. Palmer executed these securities; but they contain a proviso, that they shall only stand as security for the real balance. Now, up to August 1831, Mr. Carter was counsel to Sir W. Palmer. I admit the relation of counsel and client ceased from that time. All the cases which have been cited for the purpose of shewing that when the relation ceases, the disqualification also ceases, are out of the case; because they only apply to purchases from the client himself. If the purchase be from the client himself, he, of course, *consents* to the solicitor being the purchaser; but here the purchase was made from a *third party*, and without the consent of the client. All the cases shew the client's *consent* to be indispensable. *Ex parte Bennett* (a).

(a) 1 V. & C. 311.

In *Ex-parte Lacy* (a) and *Owen v. Foulkes* (b), the principle is laid down, that no trustee shall buy the trust property until he strips himself of that character, or by universal consent has acquired a ground for becoming a purchaser, and he cannot strip himself of that character for the purpose of becoming a purchaser without the parties *consenting* that he shall purchase. *Ex-parte James* (c).

That case shews, that a person standing in a fiduciary character cannot acquire the right to purchase, merely by divesting himself of the relationship which had existed. Before he can become a purchaser, he must have the permission of his former client; he must, in the words of Lord Eldon, bargain for the right to purchase. *Parkes v. White* (d) shews the same principle that the *consent* of the party is necessary. In that case it was held, that long acquiescence in the sale was evidence of such consent having been originally given. In *Hall v. Hallet* (e), it was decided that no attorney is permitted to buy things in litigation, of which litigation he *has* the management. Though the present tense is used, the same reason given in that case applies where he has ever had the management, and the litigation continues.

In *Biggs v. Head* (f), Sir M. O'Loughlen said, the court will not speculate about the materiality of the communication made by the solicitor, and his Honor says—there is no distinction between a discharged solicitor, and one who refuses to act (g). A discharged solicitor is equally bound to keep the secrets of his former client. I put this case—would not Mr. Carter have been restrained from being Mackmurdo's counsel? If so, he cannot be permitted to use that knowledge for his own benefit, which he could not use for the benefit of a third person. If Sir Wm. Palmer had employed a high-minded counsel, who would not have stooped to do this act, he would now have been in possession of this security at a reasonable sum. As to his fees, we will leave that matter to his own leading counsel, and pay what he awards. He demanded an absurd sum; £300 for preparing one deed was one of the items. Sir Wm. Palmer was always willing to pay any thing in reason. The whole affair of the fees was unprofessional,

[LORD CHANCELLOR.—I'll make them no part of my decree, I assure you.]

Mr. Litton and Mr. Walter Berwick followed on behalf of Mr. Carter, after which, Mr. Walter Burke replied for Sir Wm. Palmer.

*Thursday, February 15th.*

LORD CHANCELLOR.—The original bill was filed by W. P. Carter, to raise a sum of money which had been secured by bond, and a deed of

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(a) 6 Ves. 625. (b) Ibid. note at p. 29; Note. 633. 631.

(c) 8 Ves. 351. (d) 11 Ves. 226. (e) Cox 110. (f) Sausse & Sc. 335.

(g) Ibid 352.



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covenant executed by Sir Wm. Palmer. The chief defence made was, that Mr. Carter had been the confidential counsel of Sir Wm. Palmer, and that the securities had been purchased by him under such circumstances, that Sir William ought to be considered entitled to the benefit of the purchase, as if Mr. Carter was his trustee; and it appeared that a notice, offering those terms, had been served on Mr. Carter by Sir William Palmer on the 24th December, 1834. At the hearing, I made an order, declaring Mr. Carter entitled to £2,400 and interest, according to the terms of that notice, and my order also directed, that in case Mr. Carter should decline to accept those terms, his bill should be dismissed, with costs. That order has been reversed by the House of Lords, on two grounds:—First, that there ought to have been a cross-bill, in order to make the defence relied on by Sir William Palmer; and secondly, that the decree ought to have directed accounts of what was due on foot of the securities. As to the first ground, I make no doubt that the practice in England has been to require a cross bill; but, for myself and the counsel concerned, I must say, that no suggestion was made throughout, by Carter's counsel, that a cross-bill was necessary; and therefore, I do not think that the practice in England, in this respect, has been adopted here. As to the second ground, I am quite satisfied that my decree was erroneous, in directing that the sum offered should be accepted, and that if not, the bill should be dismissed. The House of Lords directed an account of what was due on foot of the securities, reserving to the party the right of filing a cross-bill, and remitted the cause back to this court. The account has been taken in the office, under the reference directed by the House of Lords, and the Master has made his report. The cause now comes on, upon exceptions taken to that report by Sir Wm. Palmer. These exceptions must be overruled. They become really immaterial by the decree in the cross-cause. Since the House of Lords made their order, Sir William Palmer has filed his cross-bill.

Both causes are now at hearing. The case made by Carter, the plaintiff in the original bill, and defendant in the cross-bill, is, that he is a *bona fide* holder of the securities executed in 1816 by Sir W. Palmer to Sheppard and Mackmurdo, and that he is entitled to the whole amount of £7,712. 11s. 3d., now appearing due on foot of those securities. The case made by Sir Wm. Palmer is, that, in the first place, there is no such sum really due as is alleged, and that there was an original stipulation in the deed of 1816, that it should only stand as a security for so much as should be found to be really due; and he also says, that, whether due or not, Carter has no right to be looked on as a *bona fide* holder of the securities for his own benefit, for that a negotiation being on foot for the compromise of those securities, and Mr. Carter having been the confidential counsel of Sir William Palmer up to August, 1831, he (without duly relinquishing that character) engaged in a negotiation with Mackmurdo

in June, 1832, which he concluded in August, 1833, for the purchase of his claims, for a sum of £2,400; there being then a sum of about £3,719, besides £300 costs, apparently due on foot of those securities; and which, with the interest since accrued, Mr. Carter seeks, by his bill, to levy from Sir William Palmer.

In my opinion, Sir William Palmer's case is completely established; I am sorry to be obliged to say, that Mr. Carter's violation of confidence is so coercively proved, as to prevent his being entitled to take the fruits of the purchase from Mackmurdo.

First, with reference to the sum charged, it becomes important to consider whether, as between Mackmurdo and Palmer, the amount was considered liable to impeachment or reduction. It has been assumed, in the argument for Carter, that this was not in question between Mackmurdo and Palmer. I think that cannot be sustained. Palmer was not engaged in the management of the affairs of Oswald and Co., nor in the accounts of the firm, but he did some acts whereby he became liable as a partner. Some time before 1815, Oswald and Co. became indebted to Sheppard and Mackmurdo. There was a dispute between the two firms as to the amount. The accounts were examined by the solicitor of Sheppard and Mackmurdo, and by two clerks of Oswald and Co. At the settling of the accounts, none of the firm were present. The accounts consisted of items for money advanced, sums due on bills accepted by Oswald and Co., and money paid on foot of premiums of insurance. There is no evidence of the accounts having ever been fairly or finally settled. The securities, however, such as they were, afterwards became vested in Edward Longdon Mackmurdo. The mode in which this took place is involved in some obscurity. Although the securities were originally executed to Sheppard and Mackmurdo, it was recited in the deed that Sheppard was alone entitled to the money secured. He afterwards became a bankrupt, and these securities were sold by his assignees to Mackmurdo. It does not appear what consideration was given on this transfer. Carter, when counsel to Sir Wm. Palmer, in March, 1827, required that Mackmurdo should shew his title to the bond.

Therefore, when Carter, in 1832 and 1833, dealt with Mackmurdo, he was aware of there being a necessity for Mackmurdo's making out his title; and when we find that Mackmurdo, in 1832, agreed to sell this charge for £1400; and, on the death of Mrs. Budworth Palmer, actually sold it for £2,400, a sum of £5,719, besides £300 additional, being then apparently due on it, would not this alone furnish evidence that the original demand was impeachable? Then, the evidence of Howell states, that he remonstrated against the execution of the deed, believing that the sum claimed was not due. It is, therefore, too much to assume that the amount was so clearly established, that no dispute existed as between Mackmurdo and Sir William Palmer. If called on as a juror, to say, whether the sum claimed was due or not, I should

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to abide by that agreement, and put the matter in the hands of his solicitor; and he states in his depositions, that his solicitor carried on various negotiations on the subject with Carter, for about a twelvemonth, without any arrangement being come to. The dates of these transactions are very important. This would bring these negotiations between Mackmurdo and Carter down to the beginning of June, 1833. Now, in March, 1833, a proposition had been made on behalf of Palmer for a compromise, and Mackmurdo said he would consider it, but did not afterwards give any answer; and it must have been about the end of May, or beginning of June, that Carter, as he says, met him in the street, and a second bargain was made between them for £2,400.

I do not adopt the imputation against Mr. Carter, that he was aware of Mrs. Palmer's death when he made his first bargain with Mackmurdo. He swears he was not apprised of it. I think I am bound to give credit to his oath, and I think it is due to him, not to impute to him so gross a fraud as that of dealing with Mackmurdo in that transaction, knowing of Mrs. Palmer's death, while Mackmurdo was in ignorance of it.

But on the whole case, looking at all the occurrences which took place, at the dates of the several transactions, the confidential character which Mr. Carter had filled, the intimate knowledge which he had of Sir William Palmer's affairs—I cannot reconcile his ignorance of the fact that the negotiations were still pending, with the facts I have adverted to. But even if he was ignorant that the negotiations were still pending, it was his duty to inquire, and it makes no difference in the decree I shall make, whether he was actually ignorant of them or not.

Under what circumstances the relation of counsel and client was put an end to does not appear. I should be willing to suppose, that Carter had dismissed himself in consequence of the affair of the fees. But whether dismissed by Sir William Palmer or by himself, he could not divest himself of the obligation not to communicate to any other, or use for his own benefit, the knowledge he had acquired of his client's affairs. This obligation rests on the clearest principles of moral duty, as well as on the most undisputed authority. Nothing is so essential to the honorable relation existing between counsel and client, or to the administration of justice. If a counsel could not communicate knowledge to a third person, in order to enable him to obtain an advantage, neither can he use it himself. If Mr. Carter had said to a third person, "Deal with Palmer for this security; I know, and will communicate the facts necessary to sustain the demand against him:" this would have been a gross violation of duty, and the court would, in such a case, restrain him, by injunction, from making such communication.

The court would restrain a counsel by injunction from divulging the secrets of a former client.

The principle on which the court acts is well defined in *Ex-parte*

*James (a)*. Lord Eldon there refused to sanction a sale of a bankrupt's estate to the solicitor of the commission, and laid down a rule, which is highly important, and applicable to this case. He says that principle requires that the assignee under the commission cannot buy, unless he *shakes off* the character, putting himself altogether out of the trust, and not then, without a little more than merely parting with the character. *(b)*. And he adds, if the principle is right as to the assignee under the commission, *a fortiori*, it is necessary to adhere to it in the case of the solicitor. The principle is so inviolable, that the question is not whether the transaction was fair or not, but whether the trustee has shaken off that character, and bargained for the right to purchase. In *Cholmonley v. Clinton (c)*, Lord Eldon *(d)* stated, that the Chief Justices of the Courts of King's Bench and Common Pleas had communicated to him their opinion, that no solicitor, who had been employed as such on one side, could afterwards be employed on the other; and, on a subsequent day, after communication with the Master of the Rolls, the Vice-Chancellor, and the Chief Baron, he said, that all the courts and judges he had communicated with were of the same opinion.

In *Bricheno v. Thorpe (e)*, Lord Eldon said, the rule as to the bar must be the same as for solicitors. The rule is not doubted in *Beer v. Ward (f)*, that if a discharged solicitor was making disclosures relating to his client's affairs, the court would restrain him. In *Wilson v. Rastall (g)* Judge Buller said, "It is a subject of just indignation, where persons are anxious to reveal what has been communicated to them in a confidential manner;" and said, "It is not enough to say that the cause is at an end; the privilege is that of the client, and never ceases at any period of time."

*Evatt v. Price (h)* very greatly resembles this case. A dispute arose between the solicitor and his clients, about costs, and the solicitor wrote a letter to his clients, telling them that he considered himself absolved from all obligation to confidence. The clients filed a bill, to restrain him from communicating any knowledge acquired by him while their solicitor, and Sir John Leach granted the injunction. There, the solicitor gave a formal notice of his intention to violate professional confidence. In this case there is that violation, without any notice.

Several cases, which have occurred in this country, have been referred to. In *Biggs v. Head (i)*, Sir Michael O'Loughlen decided these three points: *First*—That the court will not permit a solicitor to disclose any communication made to him in that character, and will not speculate about its materiality. *Secondly*, That the obligation to secrecy did not

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(a) 8 Ves. 337.

(c) Cooper, 81.

(e) 1 Jac. 300.

(g) 4 T. R. 759.

(b) Ibid, p. 347.

(d) Ibid, 87, 88.

(f) 1 Jac. 77.

(h) 1 Sim. 483.

(i) Sausse, &amp; Scully, 335.

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cease on the death of the client. *Thirdly*, That there is no difference, in this respect, between the case of a discharged solicitor and one who refuses to act.

These authorities warrant me in holding, that the court would have restrained Mr. Carter from communicating to any third person, who might have purchased this claim, the knowledge necessary to maintain it against Sir William Palmer. The present case goes beyond any of those cases. This is the case of a counsel who, for a series of years, was employed as legal adviser in confidential matters, and particularly in one transaction relative to a controverted claim, which his client was seeking to compromise, by purchasing it up on moderate terms. The counsel has bought that claim, and now seeks to enforce it against his former client; and then, I ask, in the words of Lord Eldon, "Had he, up to that time, shaken off his character of counsel, and had he bargained "for the right to purchase?" This must be answered in the negative. And further, I cannot avoid coming to the conclusion, that he was clandestinely dealing for this security, knowing that, up to the hour of the purchase, treaties were on foot for the purchase of it on behalf of Sir William Palmer.

If there be any difference between the case of a solicitor and that of counsel, it is, that the first stands on a footing of honorary rewards; and if there can be any difference between two professions equally respectable, a greater degree of delicacy should be expected from a counsel.

An additional circumstance is proved in the cause, viz., that Mr. Carter had formed a plan of dealing for the purchase of Sir William's estates; and a charge is made in the bill, of having bought up certain other securities in the name of a trustee, which is imperfectly denied.

It is deeply painful to me to enter into such an examination of the conduct of a member of a liberal profession, and I have avoided using any language beyond what was necessary in delivering judgment in the case; but I am bound to say, that the counsel for Sir William Palmer have not gone beyond their duty in characterising this transaction. I could not sanction such transactions as this, without indelible injury to the character of the profession, and to the administration of justice.

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The decree in the original cause overruled the exceptions, and declared the sum due on the securities to be £7,712. 11s. 3 $\frac{1}{4}$ d. for principal and interest, up to 30th Nov. 1838.—*Reg. Lib. fol.* 121.

The decree in the cross-cause declared W. P. Carter to be a trustee for Sir William Palmer as to the securities, and the sum due thereunder, save as to the portion thereafter mentioned, and declared W. P. Carter entitled to be paid, out of the sum due on foot of the securities, the sum of £2,400, the consideration paid to Mackmurdo, with interest at five per cent. *Ibid.*

## ROLLS.

## CONSTRUCTION OF WILL—LEGACY, VESTED OR CONTINGENT.

LUBY v. HAMILTON.

John Wetherall, being possessed of considerable personal estate, duly made his will, bearing date the 2d of April, 1786, whereby after bequeathing certain legacies and annuities, he gave to his wife all the residue of his property for her life; and after her decease, to his nephew John £1000; to his nephew Joseph £1000; to his nephew George £1000; to his nephew William £1000; and to his nephew Rogers £1000. Subject thereto, he directed that the proceeds of the residue of his property should be received by, and equally divided between his daughters Mary Hamilton, and Isabella Wetherall, share and share alike, for their lives only; and after the death of his said daughters, the said residue to be divided among the younger children of his said daughters according to their appointment; and in default thereof, to be divided equally among such younger children, share and share alike. If each of his daughters should have but one child, the whole of their respective shares was to go to such only child. If his daughter Isabella should not marry, or die without leaving any child, her share was to go to the children or child of his daughter Mary; and if Mary should die without a child, the whole of her share to go to the children or child of his daughter Isabella. And if both his daughters should die without children, then to his said nephews John, Joseph, George, William, Rogers, and Captain Frederick Wetherall, to be equally divided between them, share and share alike.

By a codicil, dated the 24th April, 1787, after reciting the deaths of his nephews George and Joseph (named as legatees in the foregoing will), the testator revoked the legacies to them; and also revoked the legacy of £1000 to his nephew John, and gave, after the decease of testator's wife, to the said John, an annuity of £60 during his life, to commence from the day of the death of testator's wife. He also gave to the children of his said nephew Joseph, deceased, £1000, to be paid to them or the survivors or survivor of them, after the decease of testator's

Bequest of £1000 "to the children of J. W." to be paid to them or the survivors or survivor of them, after the decease of testator's wife, (who was to have the interest for her life,) share and share alike; and also £1,000 to a trustee, after decease of testator's said wife, in trust to permit R. W. after the decease of the testator's said wife, to receive the interest thereof for his life; and if the said R. W. should die leaving issue to divide the said £1,000 among such issue, &c., and if the said R. W. should die without such issue, the £1,000 to go to and among the children of the said J. W. in the same manner as the

£1,000 so bequeathed to them as aforesaid.

R. W., survived testator's widow, and died without issue. Only two of the children of J. W. survived the testator's widow, but all of them died during the lifetime of R. W.—Held, that the two children of J. W. who survived the testator's widow, took as to second legacy vested interests transmissible to their representatives.

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*wife, and to be equally divided among them share and share alike. He also bequeathed to Edward Hendrick £1000, after the decease of testator's said wife, in trust to permit and suffer his said nephew Rogers, besides the £1000 bequeathed to him by his will, after the decease of testator's wife, to receive the interest thereof during his life; and if he should die leaving issue, to give and divide the said £1000 among such issue as the said Rogers should direct; and for want of such direction, to be divided among them share and share alike; and if but one, to go to such one; and if the said Rogers should die without such issue, his will was that the said £1,000 should go to, and among the children of the said Joseph, in the same manner as the £1000 so bequeathed to them as aforesaid.*

Shortly after making the foregoing codicil, the testator died. His wife survived him, and lived until Sept., 1822. His daughters also survived him, but died in the lifetime of his widow. Isabella died unmarried; and Mary left nine younger children, but made no appointment. Rogers, named in the will and codicil, died without issue in February, 1837. Joseph, named in the will and codicil, left four children, viz, Sarah, who died intestate in 1815; William, who died intestate in 1820; Joseph, the younger, who died in 1833, having by his will appointed Captain William Wetherall his executor; and Maryanne, who died intestate in 1829.

The bill was filed by the plaintiff as administrator of the said Sarah, William, and Maryanne, respectively, against the Rev. Henry Hamilton, *administrator de bonis non* with the will annexed, of the said John Wetherall deceased, and against the said younger children of Mary (the legatees of the residuary estate), and also against Captain Wetherall, executor of Joseph the younger. It stated the will and codicil, and the other facts already mentioned; and also, that Joseph the younger, and Maryanne, having survived the testator's widow, claimed as the surviving children of Joseph the first mentioned legacy of £1000 bequeathed to the children of Joseph; and that under the advice of eminent counsel, the Rev. Henry Hamilton paid that legacy to them. The bill prayed that the plaintiff and defendant Captain Wetherall as the representatives of the children of Joseph, or of so many and such of them as survived the testator's widow, might be decreed entitled to the second legacy of £1000, together with the relief incidental thereto.

The joint answer of the administrator and residuary legatees admitted the statements of the bill. The administrator admitted assets to the amount of £1000, and, with that exception, stated that the residue had been long since distributed; and that he had required an opinion of counsel as to the right of plaintiff to the second legacy, but as plaintiff's counsel declined to give a decided opinion as to such right, he declined paying it without the direction of the court. The residuary

legatees submitted, that inasmuch as all the children of Joseph died in the lifetime of Rogers, the £1000 fell into the residue, and that they were entitled to it.—The suit having been instituted by arrangement between the parties, to obtain the opinion of the court on the question thus raised, now came on to be heard on bill and answer.

Mr. Litton, Q. C., for the plaintiff.—The object of the suit is to ascertain, by the decree of this court, the persons entitled to the second legacy of £1000 bequeathed by the codicil. The testator declared his will to be, that if Rogers should die without issue, the second legacy of £1000 should go to and among the children of Joseph, *in the same manner as the first £1000 so bequeathed to them as aforesaid*. This clause must be governed by the antecedent to which it is immediately referred by the testator; and the first legacy was to be paid to the children of Joseph or the survivors or survivor of them, after the death of testator's wife. Two of them survived her, and they received as such survivors the first legacy. Rogers did not die till 1837, and he received the interest on the £1000, now in dispute, from the death of the widow, in 1822, until his own. It will be contended for the defendants, that there never was any vested or transmissible interest in any of the children of Joseph; as they all died before the period when the principal of the legacy was to be distributed, i. e. the death of Rogers. But we submit that the construction of the latter bequest must be governed by the former, *Sturgess v. Pearson* (a); *Belk v. Slack* (b).

Messrs. Warren, Q. C., Collins, Q. C., and George Battersby, for the defendants.—We submit that the second £1000, bequeathed by the codicil, lapsed into the residue; as there is no gift of the capital, until after the death of Rogers, who survived all the children of Joseph. The gift of the interest to Rogers for life, and the gift of the capital, after his death, to the children of Joseph, are distinct gifts. *Fearne*, 552, 554, (n. 3dly).—[MASTER OF THE ROLLS. Is not this second legacy bequeathed to a trustee, and did it not vest in him immediately?—The bequest is to Mr. Hendrick, as trustee; but the legacy had no separate existence, until the death of the testator's widow. Hendrick died during the lifetime of the widow. However, we do not think his living or dying affords any material distinction: but, we submit that the second legacy could not have vested in the children of Joseph, before the death of Rogers, who was entitled to the interest for his life. *Batsford v. Kebbell* (c); *Pope v. Whitcombe* (d), referred to by Mr. Williams, in his work *On Executors*.

The intention of the testator plainly was, to make provision for the personal wants of the several members of his own family. His wife, daughters, and grandchildren, are the principal objects of his care. The

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(a) 4 Madd. 411.  
(c) 3 Ves. 364.

(b) 1 Kee. 219.  
(d) 3 Russ. 124.



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provision for his wife and daughters is strictly personal, limited to them, and ceasing with their lives. If either of his daughters should die without children, the share of such daughter was to go over to the child or children of the other daughter, but not to be subject to the will, nor to pass to the representative of the daughter so dying childless. With the like intention of providing for their personal wants, are the bequests to the testator's nephews, to each of whom £1000 is bequeathed by the will; but George and Joseph having died shortly after the will was made, the testator, by the codicil, revokes the legacies to them. Then follow the bequests which give rise to the present question, and which, it should be observed, differ in kind from the preceding. The preceding bequests to the nephews are to persons named, and the testator uses technical words vesting the legacies in them, although the payment is postponed to the death of his widow, who was to have the interest for her life. But when, having revoked the legacy to Joseph, the testator proceeds to give the legacy to Joseph's children, he then changes his phraseology, and bequeathes, not to particular persons, but to a class; and, for the first time, uses the terms respecting survivorship, and directs the legacy to be paid "to them, or "to the survivors or survivor of them," after the decease of his widow, share and share alike. This first legacy to the children of Joseph was accordingly claimed by, and paid to the two children of Joseph, who survived the testator's widow. Next follows the bequest to Mr. Hendrick, the trustee, which is the immediate subject of dispute. It is to the trustee, *after the decease of the testator's wife, in trust, to permit Rogers to receive the interest thereof during his life; and if he should die, leaving issue, to give and divide the said £1000 among such issue as the said Rogers should direct, &c. &c.; and if the said Rogers should die without such issue, then the said £1000 to go to and among the children of the said Joseph, in the same manner as the £1000 so bequeathed to them as aforesaid.* This bequest to the children of Joseph is to be construed with reference to the preceding. In one respect, both bequests are alike: they are to a class, and not to persons designated; and the legacies are to be payable to the *survivors or survivor*, after certain events. But here the resemblance ceases, as they are in all other respects so essentially different, that construing both "in the same manner" will lead to opposite results. The preceding legacy was payable upon the demise of one life, viz., that of the widow; but this is not to be payable until after the demise of two lives, viz., the widow's and Rogers'. If, as to the one bequest, the survivorship is to be referred to the death of the widow, then, construing the other bequest "in the same manner," the survivorship, as to it, must be referred to the death of Rogers. As to this second legacy, the children of Rogers, if he should have any, were to be preferred; and it is only "if" Rogers should die without issue, that the children of Joseph could derive under this bequest. But as to the

children of Rogers, who were to be preferred to the children of Joseph, there is an express declaration, that nothing should go to them, unless they survived their father. The cases of *Gibbs v. Tait* (a), *Crone v. O'Dell* (b), *Daniell v. Daniell* (c), *Hoghten v. Whitgreave* (d), *Pope v. Whitcombe* (e), *Cripps v. Wolcott* (f), all shew, that the time when the legacy is to be payable or distributable is the period to which survivorship, in cases like the present, is to be referred. The case of *Cripps v. Wolcott* lays down the plain and intelligible principle just mentioned; and it has been recognised, as settling the law upon the subject, by Lord Brougham, who says, that it would be most inconvenient to shake its authority: *Home v. Pillans* (g).

The residuary fund, whatever may be its amount, has been entirely disposed of by the testator amongst his grandchildren. It cannot be supposed that he intended to deprive his grandchildren of a benefit, in favor of utter strangers, who might happen to be the representatives of grand-nephews, with whom he appears to have had little, if any, personal acquaintance. We are not here embarrassed with any question of intestacy, which distinguishes this case from *Sturges v. Pearson* and *Belk v. Slack*; in both of which the legacies were to individuals, and not to classes, and in both there must have been intestacy if the bequests had failed. In *Sturges v. Pearson*, the legacy was to be vested at the age of twenty-one; and in the bequest in *Belk v. Slack*, the word "survivors" was insensible. Besides, it must be admitted that the note of the last-mentioned case is very loose and unsatisfactory. In *Harrison v. Foreman* (h), the bequest was to individuals, and not to a class. In *Machell v. Winter* (i), Lord Loughborough says, the sole object of the testatrix was to provide for her grandchildren. Here, the testator's object was to provide for the children of Joseph, and not to give vested interests. In *Elison v. Airey* (k), the legacy was held to be contingent till the death of the tenant for life. It is a principle, that where legacies are payable to a class at a future period, all coming into *esse*, before the time of distribution are to be included; and the same principle should apply to those who are to be excluded. *Mathews v. Paul* (l). Though, in this case, the class could not be increased, it might be diminished, which could not be where the persons are named.

Mr. Longfield, in reply.—It is a principle now well established, that a bequest is not to be construed by other bequests to other persons.

(a) 8 Sim. 133.

(c) 6 Ves. 297.

(e) 3 Russ. 124.

(g) 2 My. & Kee. 25.

(i) 3 Ves. 236, 542.

(b) 1 Ball & B.

(d) 1 Jac. & W. 146.

(f) 4 Mad. 11.

(h) 5 Ves. 207.

(k) 1 Ves. sen. 115.

(l) 3 Swanst. 339.

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*Campbell v. Campbell (a)*. This bequest was one in which the testator might naturally have in view the possibility of the death of the legatees in his own lifetime, as it was in consequence of legacies having lapsed that he made his codicil. I do not enter into the cases as to survivorship, as they do not apply here. All the legatees were dead at the time of distribution; and this case comes exactly within the authority of *Belk v. Slack*. If one of the legatees was now alive, possibly the cases cited might apply in his favor; but they were never meant to rule a case where none of the legatees were living at the time of distribution. A gift, being payable or distributable at a future period, does not necessarily imply that the time of its vesting is postponed. Mr. Butler's note, quoted on the other side, was not intended to lay down such a rule, which would not be sustained by the cases cited; as, in them, there was a condition attached to the gift. *Watley v. North*, in the very same volume with *Batsford v. Kebbell (b)*, is an instance of the interest being vested. The plaintiff's right, in this case, is founded on a ground superior to that of the defendant in *Cripps v. Wolcott*. The words "survivors or survivor" do not occur, nor are they necessarily referred to in the bequest now under consideration; but, even if they were referred to, still it is submitted that the contingency is the same as in the preceding legacy, and that the case would still fall within the authority of *Belk v. Slack*.

*Wednesday, February 29th.*

THE MASTER OF THE ROLLS said, he should have some further consideration before making his decree in this case; and that as the foregoing discussion had been concluded only just then, as the court was rising, on the last day of the Hilary sittings, and the court would not sit again till after Easter, he would, as the parties might wish, either let the case stand over for judgment until the first sitting day after Easter, when his Honor would state at length the reasons for his decision, or, in a day or two, transmit the notes of the decree to the Register, who should give notice of it to the parties.

The latter alternative having been preferred, his Honor, in a few days afterwards, sent to the Register the following note of his decree:—

Declare that the plaintiff, the Rev. Thomas Luby, as the personal representative, &c., of his late wife, Maryanne Luby, otherwise Wetherall, and the defendant William Wetherall, as the personal representative of Joseph Wetherall the younger, which said Maryanne Luby, otherwise Wetherall, and

(a) 4 Brown, by Eden, 14.

(b) 3 Vez.

Joseph Wetherall the younger were the only children of Joseph Wetherall named in the will and codicil of John Wetherall, the testator, in the pleadings mentioned, living at the time of the death of Mary Wetherall the widow of the said testator, are entitled to be paid the sum of £1000 bequeathed by the codicil of the said testator, to Edward Hendrick, upon the trusts in said codicil mentioned; after deducting thereout the costs hereinafter ordered to be paid. And refer it to the Master to take an account of the sum due on account of the said sum of £1000, in case the parties shall differ; but declare that no greater sum is to be charged for interest thereon, than the amount of the dividends on the Government Stock, in which the said sum is stated in the answer of the defendant, the Rev. H. Hamilton, to be invested; and let the costs of the plaintiff and defendant be taxed and paid by the said defendant the Rev. H. Hamilton, out of the sum due on account of the said legacy; and let the residue be paid in equal moieties to the plaintiff and the said defendant W. Wetherall in the rights aforesaid.

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*Saturday, April 20th.*

AGREEMENT IN PART VOID—SPECIFIC EXECUTION OF.

DALY and others v. DUGGAN.

The bill in this cause was filed on the 3d of November, 1838, and was for the specific performance of the following agreement:—"We the undersigned, propose and promise to pay Henry Duggan, Esq., of Newmarket in the county of Cork, the yearly rent or sum of £75, and one hundred and a-half of pork, for that part of the lands of Knocklogh, as lately in the possession of Cornelius Connors: said rent and pork to commence on the 26th day of March next, and to be paid half-yearly, every 29th of September, and 25th of March, for the time and term of twenty-one years, from the 25th of March next. We also propose to pay the amount of the valuation which will be put on the house in which Cornelius Connors at present resides, when valued by two persons appointed for that purpose. We also cove-

When the plain intent of agreement is unobjectionable this court will decree specific performance of it according to such intent, though in its terms the agreement was contrary to statute.

Specific performance cannot be decreed of an agreement to sell at a price to be settled by arbitrators

named by the parties, if no award has been made; but if the parties are agreed as to a valuation, but have not appointed any persons to make the valuation, the court will itself interfere so as to ascertain the value, and direct a specific performance of the agreement.

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"nant and agree, to pay all tithes which will become due on the lands  
 "which we shall enjoy from the time we enter into possession."

(Signed)

"DANIEL DALY and

"JOHN DALY." (the plaintiffs)

"I accept the above proposal."

"HENRY DUGGAN," (the defendant.)

"Dated this 21st day of March, 1838.

Witness, "DANIEL O'CONNELL."

The bill stated the foregoing agreement; and that in part performance thereof, the plaintiffs paid to the defendant the sum of £29. 10s. on account of the house therein mentioned, the same not having been then valued; and that the plaintiffs had made several applications to the defendant to put them into possession of the said lands, or to execute a lease thereof, but that he had refused so to do. It then prayed that the agreement contained in said proposal and acceptance might be specifically performed; and that the said Henry Duggan might be decreed to put plaintiffs into possession of the said lands and premises, plaintiffs being ready, and thereby offering to pay the balance of the valuation of said house, over and above the said sum of £29. 10s.; and also, if so required by the said Henry Duggan, to prepare at their own expense, a lease and counterpart of a lease of said lands and premises, and to execute said lease and counterpart, and in all other respects to perform their part of said agreement. And if necessary, that it might be referred to one of the Masters to settle and approve of a draft of such lease, &c.

The defendant never answered the bill; but, having appeared on the 12th of November 1838, and the notice to press having been served on the 20th of February last, the cause was set down to have the bill taken as confessed, and counsel now prayed the decree of the court.

MASTER OF THE ROLLS.—That part of the agreement relating to the payment of the tithe, is contrary to law, and was made in contravention to the existing tithe acts; therefore, this court would not decree specific execution, at least of that part of the agreement. Then, there remains the question, whether an agreement in part illegal, will be enforced by this court, as to the remaining part? I must be satisfied respecting that question, before I can make any decree in this case.

Mr. Lane, with whom was Mr. Short, submitted, that this contract consists of three parts, perfectly distinct from each other; and that such a contract may be rejected as to part, and maintained as to the rest, *Newman v. Newman* (a); *Kerrison v. Cole* (b); *Wood v. Benson* (c).

(a) 4 M. & S. 66;

(b) 5 East. 231.

(c) 2 Cr. & Jer. 91.

*Butterworth v. The Dean and Chapter of Saint Paul's* (a). They further submitted, that the 12th sec.\* of the 2 & 3 W. 4, c. 119 (Stanley's act), to which his Honor alluded, was not intended to restrain the dealings between landlord and tenant; but merely to give to the church the security of the landlord for the tithe, instead of the more precarious security of the tenant; and to prevent any contract, covenant, or agreement between the landlord and tenant, having the effect of avoiding or limiting the landlord's liability. The covenant as to the tithe, is "utterly null and void" as respects the church, though it may be good as between the landlord and tenant.—[MASTER OF THE ROLLS. As to all leases after Stanley's act, a covenant by the tenant to pay the tithe is "utterly null and void." I remember a case which arose in the county Meath, where the lease was made after Stanley's act, reserving a certain rent, and containing a covenant, on the part of the tenant, to pay the tithe. Afterwards, the tenant, very unconscientiously, no doubt, but successfully, insisted that his covenant was void, and the landlord was forced to pay the tithe out of the rent reserved.]—There, it seems, the lease was maintained, though the covenant was rejected; and we should, of course, be glad to get the lease without the objectionable covenant.—[MASTER OF THE ROLLS. Yes; but the lease, without the covenant, would give you the lands upon terms different from, and less than the terms specified in your agreement.]—A lease, in execution of this agreement, need not adopt its form. It is plain, that the second clause of the agreement, that the plaintiffs should pay the amount of a valuation to be put on a certain house, was not intended to be inserted in the lease; but that the payment, according to such valuation, was to be a preliminary to, or preparatory arrangement for the lease. The plaintiffs have accordingly paid to the defendant the sum of £29. 10s., on account of the house, though no valuation has as yet been made. In like manner, the lease, in specific performance of the agreement, need not contain the clause as to the tithe. The intention of the parties plainly was, that the landlord should have the rent reserved clear of the tithe to which the premises are liable. The whole course of legislation on the subject shews, that the legislature contemplated what was, indeed, the necessary consequence of shifting the liability to the tithe from the tenant to the landlord, that the landlord would add to the rent an equivalent for

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(a) 1 Bro B. C., 240.

\* The following is the 13th section of 2 & 3 W. 4, c. 119:—

"And be it enacted that from  
"and after the passing of this  
"act, in all cases where any land  
"shall be let, or set, or demised  
"in Ireland, the lessee or te-

"nant thereof shall hold such  
"land free from the payment of  
"tithes, or composition for tithes:  
"and all contracts, covenants, and  
"agreements to the contrary here-  
"of, howsoever made, shall be  
"come utterly null and void."

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the tithe which he has been made liable to pay. There can be no objection to his doing so, and no more is intended by this agreement. The plaintiffs are willing to take a lease, reserving a rent compounded of the rent specified in the agreement, and of the amount of the rent-charge, in lieu of tithe payable in respect to the lands to be demised. Such a lease would satisfy the intention of the agreement. If the defendant had raised the objection, by plea or demurrer, to the covenant as to the tithe, we might have amended, stating the intent of the agreement, and that we are ready to take a lease reserving a rent compounded of the £75 and the amount of the rent-charge payable in respect of those lands in lieu of tithe; to which the landlord could not be allowed to object. *Davis v. Hone* (a); *Mistair v. Gillespie* (b). Here, the landlord must be considered as confessing our right.

Monday, April 22d.

The MASTER OF the ROLLS, having referred to this case, now delivered the following judgment:—

I was at first disposed to think that there were two formidable objections to the prayer of this bill. One of them was, that part of the agreement which the bill seeks to have specifically performed is void, and contrary to the statute; and that (although it has been argued that this agreement is divisible, consisting of distinct parts) it would be impossible wholly to reject the illegal part, and give due effect to the rest. But the case of *Butterworth v. the Dean and Chapter of St. Paul's* (c) is a strong authority with the plaintiff; and I think, after further consideration, that this agreement as to the tithe means no more than that the tenant shall yearly pay to the landlord, over and above the sum of £75, the amount of the rent charge, in lieu of tithe, which the landlord must pay in respect of the lands. I have thus got over the first objection, and am of opinion that the court may decree specific performance of the part of the agreement by the execution of a lease reserving a rent compounded of the £75 and the amount of the rent-charge, in lieu of tithe payable in respect of the lands to be demised.

The other objection which occurred to my mind was, that this agreement is, amongst other things, for payment of the amount of a valuation not yet made; and I was at first inclined to think, that the court could not decree as to such an agreement. But the judgment of Lord Eldon, in the case of *Wilks v. Davis* (d) supplies a distinction which avoids the objection in this case, as it shews, that although the court cannot decree as to a price to be settled by arbitrators, when the arbitrators have been

(a) 2 Sch. & Lef. 341.

(c) 1 Bro. P. C. 240.

(b) 6 Ves. 621, 632.

(d) 3 Mer. 509.

named by the parties, and have not made their award; yet, that where it is agreed a valuation shall be made, but the parties to make the valuation, as in this case, are not named, there the court will itself interfere to ascertain the value, and decree specific performance. I shall, therefore, order this agreement to be performed, and refer it to the Master to ascertain the value of the house mentioned in the agreement, and the amount of rent-charge payable in lieu of tithes in respect of the lands to be demised; and also to approve of a lease to be executed by the defendant; the rent reserved to be compounded of the £75 and the amount of the rent-charge payable in lieu of tithe.

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Friday, May 3d.

SAME CAUSE.

# PRACTICE—ANSWER AFTER DECREE.

On the 20th of April, plaintiffs obtained a decree *pro confesso* in this cause, as already stated, and on the 22d of April the defendant's answer to the bill was filed. Immediately afterwards, the defendant's solicitor, by notice, called upon the solicitor for the plaintiffs, on their behalf, to consent that the decree *pro confesso* should be set aside, and the defendant's answer be allowed to stand; upon the terms that the defendant should pay the costs of setting down the cause, and also the costs of the hearing, and of all subsequent proceedings had thereon. The plaintiffs not having given any reply

The answer of a sole defendant filed within two days after a decree *pro confesso* had been obtained, allowed to stand and the decree *pro confesso* set aside, upon terms, though the affidavit to ground the application did not particularly shew any grounds of defence upon the merits.

Mr. Martley, Q. C., with whom was Mr. Coppinger, now moved pursuant to notice, that the decree *pro confesso* obtained by the plaintiffs in this cause on the 20th of April last, and all subsequent proceedings had thereon, be stayed; and that the defendant's answer, filed on the 22d of April last, be allowed to stand filed, notwithstanding the said decree; on the terms of the defendant's paying the costs of the setting down of this cause, also the costs of the hearing, and of all subsequent proceedings had thereon; or, for such other order, &c.

The affidavit of the defendant's solicitor stated the notice above-mentioned, and also several facts by which it appeared that the delay of the defendant's answer had been unavoidable; and that in consequence of communications had with the solicitor of the plaintiffs, who was apprised that the defendant's answer had been prepared, and, with a *dedimus* had been sent down to Cork to be sworn by the defendant, the defendant's solicitor, who resides in Cork, rested satisfied that the defendant should have been allowed the necessary time for filing his answer. But as to the merits, the affidavit stated only, that deponent was "advised" and verily believes that the defendant has a good, substantial and honest



April, 1839. "defence on the merits of the plaintiffs' bill in this cause." Counsel referred to the 48th General Order (Nov. 1834).

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Mr. Lane, for the plaintiffs, submitted that a decree *pro confesso*, could not be set aside without a bill of review; and that the English authorities are uniform upon the subject.—[MASTER OF THE ROLLS. In Ireland a different practice has been followed, and I think the case of *Foster v. Lynch* (a) is a direct authority for the present application, according to the old practice in this country; and that the 48th rule, already referred to, expressly saves the old practice in this respect. I am aware that the English decisions have gone much further in reference to this question than I should be prepared to follow them; especially, one in which it was held that the answer should not be allowed, though filed the very day the decree *pro confesso* was obtained. I do not understand the principle of those decisions: to me it seems very like injustice, to conclude a party unheard, though anxious to defend himself, unless he adopts the circuitous and expensive course, by a bill of review. The desertion of one's right might often be preferable to the taking of such a course; and nothing less than an express decision of the House of Lords shall oblige me to sanction a practice which, to my mind, appears to be so manifestly unjust.]—At least, a party should not be let in without shewing that he has a defence upon the merits: *Herne v. Ogilvie* (b); *Heyne v. Heyne* (c). Here, the defendant's solicitor has made a long affidavit for the present application, but he has not suggested any ground of defence, nor shewn to the court that the present application is for any other purpose than delay.

MASTER OF THE ROLLS.—The solicitor's affidavit explains, I think satisfactorily, the cause of the delay which has occurred, and distinctly states, that there neither is nor has been any intention whatever of retarding the cause. It is true, that the affidavit does not particularly shew the grounds of the defence; but it states that the deponent is advised and believes that the defendant has a good defence upon the merits, and I do not see any reason why I should not now admit him to make it, upon the terms of his paying the costs incurred from the time of his appearance to the time of the service of the notice of this motion.

Mr. Lane asked for costs.

Mr. Coppinger, *contra*, said, that as the question which the plaintiffs sought to raise had been long since settled by *Foster v. Lynch* and,

(a) Ridg. Par. Cas.

(b) 11 Ves. 77.

(c) Jac. 49.

*Denny v. O'Connell (c)*—the present opposition of the plaintiffs was vexatious, and that they were not entitled to costs. *April, 1839.*

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Let the said decree, bearing date the 20th of April last, be set aside; and let the answer of the said defendant, Henry Duggan, filed on the 22d of April last, be allowed to stand filed in this cause, upon the terms of said defendants paying all the costs incurred by the plaintiffs subsequent to the appearance of the said defendant, and up to the time of the service of the notice of this motion; and let the costs of this motion abide the event of the costs in the cause.

(a) 5 Law Rec. N. S. 292.

*Tuesday, April 23d.*

CREDITOR—COSTS.

KELLY and another, v. KELLY and others.

This was a creditor suit, praying that the will of Hubert Kelly deceased might be carried into execution; and that in pursuance thereof, his real estate might be sold for payment of his debts. In 1822, there was a decree to account; and in 1825, a final decree for a sale.

James Cowley, a creditor who obtained a judgment for £224. 7s. 3d. against the said Hubert Kelly, as of Easter Term, 1802, by an order of this court, in 1833, obtained the carriage of the decree, and it was ordered, among other things, that he should proceed without delay to have a sale under the said decree and the said order; and that he should be at liberty to carry on the proceedings in this cause, upon indemnifying the plaintiffs against any future costs to be incurred in his name. Cowley accordingly proceeded, and incurred considerable costs, in making out title to the lands, which were sold, and the purchase money lodged in bank to the credit of this cause.

On the 7th of June, 1838, there was an order of reference to the Master, to report the several sums remaining due under the decree, for principal, interest and costs, according to their respective priority, if any; and also to report the funds in bank, applicable to pay the same. It was further ordered, that the said Master should allocate the said funds as

In a creditor's suit, where after final decree, J. C. a creditor, obtained the carriage of the decree and was ordered to proceed without delay, to have a sale—*Held* that J. C. was entitled in priority to the costs of making out title; though the funds realised did not reach his demand.

Pending a reference under an order whereby, *inter alia*, the Master was directed to report the costs of the refer-

ence and of the order to pay out the funds, the Master transferred the carriage of the decree, &c., from J. C., to M. W., another creditor, and reported that the costs of the reference would be payable to M. W., then having the carriage of the decree—*Held*, that J. C. was entitled to so much of the costs of the reference as were incurred up to the time when the carriage of the decree, &c., was transferred to M. W.

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far as they would extend, in payment of the said sums as decreed, and costs as decreed, according to their respective priority, if any; and that solicitors claiming liens upon the costs decreed, should ascertain such lien by affidavit; and that the Master should have regard thereto when allocating the said funds. It was further ordered that the said Master, in allocating the said funds, should report the costs of this reference, and also the costs of the order for paying out the said funds, as far as the same could be ascertained, and set apart a sum for payment thereof.

Pending this reference, the Master took the carriage of the decree from Cowley, and committed it to Waldron, another creditor. Cowley proceeded to tax his costs of making out title, which were taxed to the sum of £234. 15s 8d.; but, in consequence of some delay, which was satisfactorily accounted for by Cowley's affidavit, the taxation was not completed until after the 19th of February last, when the Master made up and signed his report under the foregoing order.

The Master reported that the entire fund to be allocated consisted of £1008 stock, and £96 cash. That, by an order of the 18th of January last, he had transferred the carriage of the decree from Cowley to Waldron. That Cowley's costs had not as yet been taxed and certified; but that he (the Master) set apart £200 stock, part of the £1008, &c., for payment of the same when taxed; without prejudice however to Waldron's objecting that he is entitled to be paid the said sum in discharge of the balance due on foot of his demand, in priority to Cowley. The report further stated, that the costs of the reference, and of the order to pay out the fund had not been ascertained, but that the Master had set apart the sum of £60, another portion of £1008 stock, for payment thereof; and that the costs of the reference and of the order to pay out the fund would be payable to Waldron, to whom, by the said order of the 18th January last, the carriage of the decree had been committed. That after setting apart the said £260 stock, for costs, there remained to be allocated £748 stock, and £96 cash. That there was due to C. Kelly, the sum of £229; and that it was the first charge upon said fund. That there was due to Waldron the sum of £870; and that it was the second charge upon said fund. That there was due to Cowley on foot of his judgment the sum of £231; and that the same was the third charge upon the said fund.

Mr. Keatinge, Q. C., with whom was Mr. Rogers, for Waldron, now moved that the £748 stock, and £96 cash, standing to the credit of this cause, and found by the Master after setting apart the £260 stock for costs, might be transferred and paid to the said Kelly and Waldron respectively, pursuant to the report.

Mr. Wm. Brooke. Q. C., with whom was Mr. J. J. Murphy, at the same time came in upon a cross notice, on behalf of Cowley, and moved

that notwithstanding the Master's report, the Accountant General might be directed to transfer to the said Cowley, or his attorney, so much of the stock now standing to the credit of this cause as, at the price of the day, on the 16th and 18th of February last, was equivalent to the sum of £234. 15s. 8d., being the amount of the costs taxed and certified by the Master, of the said James Cowley, of making out title to the lands sold under the decree in this cause; and that the said Accountant General might also be directed to transfer to the said Cowley, or his attorney, such further amount of the said stock as, at the price of the day, would be equivalent to the sum of £61. 9s. 10d., being the amount of the costs as taxed and certified by the Master, of the said Cowley in obtaining the order of the 7th of June, 1838, and proceeding in the reference thereby directed.

On the part of Waldron, it was insisted, that the practice of this court, respecting creditors' costs, is established by *Taylor v. Gorman*, reported in a note to *Peyton v. M'Dermott (a)*, in which it is expressly decided that the plaintiff shall be entitled to his costs only, according to the priority of his demand. The rule is laid down without exception, and it is decisive against Cowley's claim.

MASTER OF THE ROLLS.—Certainly, in *Taylor v. Gorman*, as reported, the rule is very broadly stated; but I cannot help doubting that it was intended to govern a case of this kind. There is no doubt that the old rule, according to which the plaintiff in a creditors' suit was in every case entitled to his costs, produced much vexatious and wasteful litigation. Equity plainly required a different practice—that, as a general rule, the plaintiff's costs should stand in the same degree with his demand; but I understand this only as a general rule, and am inclined to think that the Lord Chancellor did not mean to lay it down as one without exception. In this court, as stated by his Lordship, the practice has varied as to the costs incurred prior to the decree, but, as I believe, not as to the costs of making out title. In the Court of Exchequer, where the plaintiff generally is entitled to his costs only in priority with his demand, an exception has been made for costs in the nature of salvage costs, e.g. the costs of collecting into an available fund the scattered parcels of personal estate; and also, the costs of making out title to the lands sold under the decree. It is, I think, but reasonable that such costs should be excepted: for the fund realised could not have existed without them; and it would be very hard, and, as it seems to me, a dangerous principle to establish, that a creditor, proceeding *bona fide* for the benefit of all parties, should, after all, not be entitled to the necessary costs of making the fund available, if it should turn out that the fund realised

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(a) *Drew & Walsh*, 235.

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does not extend to his demand. I doubt that the Chancellor intended to go that length.

Mr. *Rogers*, in continuation.—The language of the Chancellor is very strong: it does not state any exception to the rule laid down; and, construing the judgment of the court in context with the facts to which it was applied, it would seem as if such exceptions could not have been intended. It is therefore submitted, that *Taylor v. Gorman* must govern this case. But if the court should hold that *Taylor v. Gorman* is distinguishable from the present case, then, it is submitted, that Cowley cannot have, on account of his costs of making out title, more than the £200 stock set apart by the Master; and as to the costs of the reference, Waldron, who has had the carriage of the decree and of the allocation order, is entitled, as reported by the Master.

Mr. *Wm. Brooke*, Q. C., *contra*.—The Master would have set apart the full amount of Mr. Cowley's taxed costs, had they been taxed in time for the report. Cowley's affidavit satisfactorily accounts for the delay, and the fact is not controverted, that it was caused by the Master's absence from Dublin. It is therefore submitted, that the report should be read as if the Master had set apart the full amount of the costs of making out title as taxed; and that the sole question here is, whether Cowley is entitled to those costs, the fund being deficient, and not reaching his demand. *Taylor v. Gorman* establishes no more than the general proposition, which is not controverted, that a plaintiff in a creditor's suit shall be entitled to his costs only in the same priority with his demand; but, both in this court and in the Exchequer, the costs of making out title, and bringing the fund into court, are the first charge upon the fund realised by their means. The very late case of *Maguire v. Dundass*, in the Exchequer (a), is precisely in point.

As to the costs of the reference, Cowley is clearly entitled, at least, to part. He issued several summonses, and had the carriage of the order until the reference was considerably advanced; and he is therefore entitled to the costs of the proceedings under the order, at least up to the time when the carriage of it was taken from him.

MASTER OF THE ROLLS.—I entertain a very decided opinion upon this case; but, as I am pressed with the authority of the Lord Chancellor's decision in *Taylor v. Gorman*, which, as reported, seems to be an authority the other way (though I am inclined to think it was not so intended), I shall confer with his Lordship upon the subject before making any order upon this case.

(a) *Ante*, 25.

Wednesday, April 24th.

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THE MASTER OF THE ROLLS now made his order in this case and said,—

I have conferred with the Lord Chancellor respecting his Lordship's rule in *Taylor v. Gorman*, and have learned that it was not intended to apply to a case like this; and that I have his Lordship's sanction for the order I am about to pronounce.

In this case, after the lapse of nearly nine years from the date of the final decree, Mr. Cowley obtained the carriage of it. The suit had, in effect, been abandoned, when by his diligence and incurring the costs of making out title, a considerable fund was brought into court. The costs of realising a fund ought in equity to be the first charge upon it; and have been so held to be by the late Master of the Rolls in several cases, of which *Thompson v. Cooke* (a) is one. The very recent case of *Maguire v. Dundass* (b) in the Exchequer, is also a precise authority for Mr. Cowley's application; and I entirely agree with Baron Pennefather, as to the distinction marked by him in that case.

Here, the circumstances are peculiar, and the case, as respects Mr. Cowley, is really a hard one. Of Mr. Waldron's demand there was no notice in this cause, until after the fund had been realised;—it was questionable, and was not let in without several grave objections to its admissibility.\* The unexpected intervention of this prior claim swallowed up nearly the entire fund realised by Cowley's diligence, and which, otherwise would have abundantly reached and satisfied his demand. The rule in *Taylor v. Gorman*, which is the general and very proper rule as between a number of judgment creditors, respecting the costs of prosecuting the suit prior to the decree, and now so important, since a creditor by a simple contract may go against the real estate of his debtor, does not apply to the costs of a creditor *bond fide* carrying the decree into effect for the benefit of all parties, and making the fund available. In cases of this kind, as I have already said, a different rule prevails; and if it were not so, I would struggle to the last before I should yield to a rule, obliging me to refuse the costs of realising the fund; because, as in this case for example, by an unexpected intervention, it happens not to extend to the demand of the person by whose diligence it was obtained.

Mr. Cowley must have the full amount of his costs of making out

(a) 1 Hog. 28.

A. etc. p. 25.

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\* See the particulars of Waldron's case reported at length, *Kelly v. Kelly*, 6 Law Rec. N. S. 222.

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title as taxed, and also the costs of the reference, so far as the proceedings upon it were taken by him.

Order.—Let the Accountant General transfer to C. Kelly the amount of stock, &c., &c., as reported; and to Cowley, stock equivalent to the sum of £234. 15s. 8d. the amount of his taxed costs of making out title, and also, stock equivalent to the sum of £20 for his costs of the order to allocate, and of his proceedings thereon; and let the residue of the stock and cash, being, &c., &c., be transferred and paid to Mr. Waldron, in part payment of the sum reported due to him, and the cost of the allocating report since he got the carriage of the order to allocate.

*Saturday, May 11th.*

#### WATER COURSE—INJUNCTION, EX-PARTE

M'SWINEY v. HAYNES.

Where a mill-stream broke through the bank mearing the defendant's ground, and the stream was escaping into a new channel, and irreparable injury was to be apprehended, the court made a conditional order before appearance, to restrain defendant, &c., from preventing the plaintiff, &c., from repairing the bank for the purpose of bringing back the stream into its proper channel; and also to restrain the said defendant, &c., from preventing the said plaintiff, &c., from entering on that part of the lands in the possession of the defendant, which formed part of the bank of the stream, to repair the breach; and also to restrain the defendant, &c., from cutting, digging, or making any channel for the water of said stream, on the lands in his possession, whereby the water-course might be diverted from plaintiff's mill—unless cause within six days.

The plaintiff in this case was the proprietor of extensive mills at Carrigrohane, adjacent to the river Lee, in the south-west liberties of the city of Cork, and had been in the uninterrupted enjoyment of them, and of the mill-stream and waters incident thereto, for upwards of twenty years. The defendant was tenant of the lands of the other side of the river, for a term of years only; and there was no privity by deed or otherwise, between him and the plaintiff. An ancient weir or mill-dam had existed, time immemorial, across the river, extending from the mouth of plaintiff's mill-race to the defendant's grounds, and turning into the mill-race the whole body of the river, when necessary. The plaintiff had repaired the weir from time to time, without any hindrance or objection. The land at the opposite side of the river being very low and easily flooded, and the defendant having ploughed and turned up the green sod which bound the bank, close to the end of the weir, on the morning of the 6th of April a heavy flood burst through, making an entirely new passage for the river, and leaving the plaintiff's mill-race perfectly dry. The plaintiff immediately proceeded to fill up the breach, and landed at the defendant's side, in order to connect the weir with it, and to face the banks. This the defendant resisted, and threw some of the plaintiff's men into the river, when they were attempting to land. He also threatened to prevent them from ever repairing

the breach, unless they gave him a large sum of money for his permission, and proceeded to dig up the ground near the breach, saying he would effectually prevent the river from being brought back to its original channel, if they did not agree to his terms.

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Mr. *Bullen* now moved upon the bill and affidavit, according to the prayer of the bill, for an injunction to quiet the plaintiff in his possession; to prevent the defendant from digging or turning up the ground at his side of the river, to the injury of the plaintiff; also to restrain him and his workmen from interfering with, or preventing the plaintiff and his servants, and laborers, from repairing the breach in the weir forthwith, and bringing back the river to its original course; and also, that the plaintiff might be at liberty to land and enter upon the ground of the defendant, with workmen and materials, to make the necessary repairs; the plaintiff undertaking not to do any unnecessary mischief or injury.—The present application was made *ex-parte*, and before appearance; but a notice having been served on the known solicitor of the defendant, apprising him that such an application would be made, and requiring his attendance in the court, he now attended in person and by counsel.

Counsel observed, that in this case irreparable injury must ensue, unless the court should be pleased immediately to interfere; and cited the following cases in support of his application: *Ryder v. Bentham* (a); *The Attorney General v. Nicholl* (b); *Crowder v. Tinchler* (c); *Chalk v. Wyatt* (d); *Crockford v. Alexander* (e); *Robinson v. Lord Byron* (f); *Lane v. Newdigate* (g); *Lord Falmouth v. Innys* (h); *Blackmore v. Glamorganshire Canal Company* (i); *Lord Ripon v. Hobart* (k). The plaintiff's affidavit stated positively, that the banks of the river were so low and so liable to be flooded, that if the defendant should not be restrained from cutting them away, and the plaintiff be allowed to land at the defendant's side, and make the necessary repairs, the river would be permanently diverted, and it would be impossible to bring it back to its proper channel. It was therefore submitted that the injunction now sought, was to prevent very great and irreparable injury, and ought to be granted.

Mr. *Lane, contra*.—The present application is *ex-parte*; the defendant has had no opportunity of answering the plaintiff's allegations. Here is a serious question between the parties, as to the plaintiff's right to land upon the defendant's ground, to be decided by a court of law

(a) 1 Ves. Sen. 543.

(c) 19 Ves. 622.

(e) 15 Ves 139.

(g) 10 Ves. 192.

(f) 1 Myl & Kee. 161.

(b) 16 Ves. 338.

(d) 3 Mer. 648.

(f) 1 Bro. Ch. Ca. 587.

(h) Mos'ey 87.

(k) 3 Myl & Kee. 174.



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before the plaintiff can be entitled to equitable relief. No case of such an injunction as that now sought can be found; and it would be going far beyond any jurisdiction hitherto exercised, to grant a right of entry upon another man's ground, where that right is disputed, and before the question at law has been determined.

THE MASTER OF THE ROLLS.—The present application is a novel one, calling for extraordinary exercise of the jurisdiction of this court. However, the occasion is urgent, and irreparable injury is to be apprehended. I shall examine the authorities upon the subject.

*Monday, May 13th.*

THE MASTER OF THE ROLLS, having referred to the foregoing case, now said,—

I have read the plaintiff's affidavit, and looked into the authorities upon the subject, and have decided upon making an order by which the relief prayed may be obtained.

As stated in the affidavit, here is an extensive flour mill suddenly deprived, by a casualty, of the use of a water-course, which it has enjoyed, without interruption, for the last twenty years and upwards. The defendant, who is a mere termor for years of the land at the other side of the river, appears to have caused the accident, by breaking the ground and weakening the embankment close to the end of the weir. There is no privity whatever between the parties; and the defendant, being himself the cause of the accident, will not allow it to be repaired unless the plaintiff gives him a sum of money for his permission. He has even gone so far as to throw some of the plaintiff's men into the river, when they attempted to land for the purpose of making the repair; and threatens that he will never allow the river to be brought back to its old channel unless the plaintiff agrees to his terms.

Here, then, is the plaintiff entitled to the use of the river flowing in its regular channel. It is the working power of his mill, and any interruption or withdrawal of it must stop the mill, and be attended with certain loss, and the risk of irreparable injury. Besides, it appears that the ground on the defendant's side of the stream is very low, and liable to be flooded, so that there is danger of the river being permanently diverted, unless the breach be repaired forthwith. I presume it is not intended to deny the plaintiff's right to the use of the water-course, nor that the defendant is entitled, for his term, to the use of the ground at the other side of the river. Both rights I take to be admitted, and the simple question is, whether the plaintiff, being entitled to the use of the water-course, is not also entitled to preserve it, and to insist that the defendant, with whom he has no privity, shall not use the bank of the

stream to the prejudice of his right? I think he is so entitled. It is an old principle, that every right has its remedy; and this appears to be peculiarly a case in which a Court of Equity should put that principle into activity, and, if possible, prevent the consummation of a mischief for which it must be doubted that an action of damages could supply an adequate remedy. Surely, an utter stranger cannot be allowed to use his possession, either capriciously or from interested motives, to the injury of those around him. The plaintiff asks nothing unreasonable; he only prays to be allowed to put matters *in statu quo*, at his own expense, and that the defendant may be restrained from preventing him. The cases of *Lane v. Newdigate* (a) and *Robinson v. Lord Byron* (b) are, I think, clearly in point, and I shall follow the rule laid down in them.

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Although this application is *ex parte*, the plaintiff has very properly given notice of it to the known solicitor of the defendant, who, with counsel, appeared upon the motion; so that the defendant can scarcely say that this order has been made behind his back: and I think, if the plaintiff uses due diligence, he may fully obtain his object by it.

Order:—

Let an injunction issue to restrain the defendant, William Haynes, and all persons acting under his authority, or on his behalf, from preventing the plaintiff, his assistants and laborers, from repairing the weir or dam on the river Lee, near to the mill called Carrigrohane Mills, in the pleadings in this cause mentioned, for the purpose of bringing back the water of said river into the course or channel through which it was accustomed to flow previous to the 6th day of April last, so as to supply a sufficient quantity of the said water for the working of said mills, as worked previous to the said day; and also to restrain the said defendant, and all persons acting under his authority, or on his behalf, from preventing the said plaintiff, and his assistants and laborers, from entering on that part of the lands of Temple Hill, in the possession of the defendant, which, from or before said 6th day of April last, formed part of the banks of the said river Lee, for the purpose of repairing the said banks of the said weir or dam, so as to cause the water of the said river Lee to flow through the course or channel through which it was accustomed to flow previous to the said 6th day of April last. And also to restrain the de-

(a) 10 Ves. 192.

(b) 1 Bro. Ch. Ca 587.

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defendant, and all persons acting under his authority, or on his behalf, from cutting, digging, or making any channel for the water of said river through the bank of the said river on the said lands of Temple Hill, in his possession, by means or in consequence whereof the water of said river would be diverted from the water-course leading to plaintiff's said mill, unless, within six days of the service of this order on said defendant, good cause shall be shewn to the contrary.

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*Saturday, May 11th.*

PRACTICE—MAKING OUT RENTAL.

PEYTON v. M'DERMOTT.

Where, after a decree for a sale, the tenants refused to shew their leases, &c. and the plaintiff was consequently unable to make out the rental, the court ordered that the lands should be let, unless cause in ten days; and any tenant shewing cause to state particularly the nature of his tenure.

Mr. HENRY O'HARA moved, on behalf of the receiver, for a conditional order, that the lands in the pleadings mentioned, and in the possession of the several tenants named in the notice, might be let, according to the course of the court.

There had been a final decree for the sale of the lands, and the plaintiff not having any counterparts or copies of the tenants' leases, and being thereby unable to prepare a rental, an application was made by the receiver to the Master, under the 185th General Rule. The Master directed notices to be served on the tenants, requiring them to produce to the receiver, at the times and places specified, the leases, articles, &c., if any under which they derived, and engaging that the receiver would allow them the expenses of such copies as they should furnish; and that the receiver, with at least one other competent witness, should compare all such copies with the originals, and should certify the same on every such copy, so as to have for the purchaser good secondary evidence of the nature and contents of such instruments. And in case the said tenants or any of them should neglect to give such inspection, or to furnish such copies, the receiver was further directed to cause an application to be made to the court for a conditional order to let the lands.

The receiver accordingly served the notices, as directed by the Master, on the several tenants, some of whom complied with the notice; but those against whom the receiver now moved had neglected or refused to comply; and the object of the present application was, either to get rid of those tenants, or oblige them to shew cause against the order, and thereby give reasonable information respecting their tenures.

**MASTER OF THE ROLLS.**—This is a very proper application, under the circumstances. May, 1839.

Let the Master be at liberty to let the lands in the possession of the several tenants mentioned in the notice, according to the course of the court, unless cause, &c. in ten days after the service of this order; and in case the said tenants, or any of them, shall shew cause, let them state particularly under what leases, articles, or instruments in writing they claim to hold their respective farms.

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PEYTON  
v.  
M'DERMOTT.

—◆—  
*Saturday, May 4th.*

**PRACTICE—MAKING CONDITIONAL ORDER ABSOLUTE.**

**SINGLETON v. KYLE and another.**

There had been a conditional order for an injunction to prevent certain tenants cutting turf for sale; and an affidavit was filed, as cause, on the 26th of February last.

Mr. *Hutton* now moved to make the conditional order absolute, notwithstanding the affidavit.

**MASTER OF THE ROLLS.**—I have of late repeatedly had occasion to observe, that motions of this kind are unnecessary and not according to the practice of this court. When an affidavit is filed as cause against a conditional order, the party making or relying upon the affidavit should give notice of it, and that he will come in and move upon it. If he does not move accordingly, then the conditional order will be made absolute as of course in the office. The present application is according to the practice in the Court of Exchequer, but not to the practice of this court, which appears to me to be the most convenient. In this case, as the affidavit on behalf of the tenants was filed on the 26th of February, and they did not think proper to move on it, the plaintiff was entitled, as of course, to have the conditional order made absolute in the office, immediately after the notices of the 26th of February were discharged.

In this court, when an affidavit is filed as cause against a conditional order, the party should move upon the affidavit, or otherwise the conditional order will be made absolute as of course in the office.

## EQUITY EXCHEQUER.

*Thursday, February 7th.\**

## ADMISSION OF ATTORNEY—APPRENTICESHIP.

In re POWELL.

In computing the period of apprenticeship to an attorney, the Court reckons by *terms*. Therefore, a party who has served for 20 terms is entitled to be admitted an attorney.

Mr. M. BAKER applied, that Mr. Powell should be admitted an attorney of this court, under the following circumstances. In March 1834, he had been bound apprentice to the late Mr. L. Parke, at which time the stamp duty was paid; he had served Mr. Parke until his death, which happened on the 3d July, 1838, but he was unable to get the transfer of his indentures of apprenticeship to his present Master filed, until the 15th November, 1838, and from thence to the present time he had served.

PENNEFATHER, B.—If this gentleman gets credit for the time between July and November 1838, he has served his full time. He has in fact served *twenty terms*, and we have always considered that a substantial service of the apprenticeship.

Application granted.

\* Hilary Term.

*Saturday, April 27th.*

## TITHE—RENT-CHARGE—SUMMARY PETITION, PRAYING EXEMPTION OR REDUCTION.

In the matter of DANIEL CONNOR, Petitioner, His Grace the Duke of DEVONSHIRE, Respondent;  
And of the Act of Parliament of the 1 & 2 Vic., c. 109.

On a summary petition under the 16th section of 1 & 2 Vic. c. 109 the court has no jurisdiction to declare a certificate to be null and void: it can only amend the certificate and apportion as to the charge on the petitioner's lands.  
On such a petition the court has no jurisdiction to decide between two conflicting certificates.

This was a petition purporting to be presented under the 16th section of the late act. \* It stated, that under a certain marriage settlement of the 18th of May, 1822, the petitioner was seized of an estate

\* 1 &amp; 2 Vic. c. 109.

for life, derived out of an estate in fee-simple, in the lands of Outlagh and Shanlaragh, situate in the parish of Kilmichael in the county of Cork, and in the diocese of Cork and Ross. That in and previously to the 29th of April, 1826, the Duke of Devonshire was entitled to the *rectorial* tithes of the said lands of Outlagh and Shanlaragh, and of other lands in the parish, the names and descriptions of which were unknown to the petitioner; and that the Rev. Robert Warren, as incumbent, was entitled to the residue of the rectorial tithes, and to all the *vicarial* tithes of the said parish.

That for many years previous to the said 29th of April, 1826, the said Duke and his ancestors had neglected to demand or receive any tithes out of the said lands of Outlagh and Shanlaragh, and that all tithes paid thereout were paid to the successive vicars and incumbents of the said parish, and to no other person whatsoever.

That on the 29th of April, 1826, two commissioners, John Barton and William Howard Holland, duly made a certificate of composition for all tithes *whatever*, payable within said parish, awarding the annual sum of £692. 6s. 2d. British currency, as the just amount of all said tithes; and that the entire of said sum was payable to the Rev. Robert Warren, rector and vicar of said parish; said sum having been agreed to at a special vestry held on the 20th day of April, 1826.

That the certificate was duly registered. That the said sum exceeded the average amount of all sums payed or agreed, or adjudged to be paid in lieu of tithes, during the seven years preceding the date of said certificate. That the said composition was duly and regularly and *bond fide* made under the belief, that the incumbent of said parish was the only person entitled to the tithes thereof, and that the said Duke of Devonshire and his agents in Ireland had notice thereof, and did not object thereto, or make any claim for tithes after the making of said composition, until the time therein-after mentioned, and that the petitioner demised part of his land within the said parish tithe-free, pursuant to the provisions of the 4 G. 4, c. 99, s. 41.

That in the year 1834, the Duke of Devonshire, for the first time after the making of said composition, raised a claim to some part of the said tithes, which had been adjudged to the said incumbent by the aforesaid commissioners, and for the purpose of enforcing his said claim, the Duke procured the appointment of a sole commissioner,\* namely, one John Kidd, who, on the 11th of April, 1834, made a new certificate,

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\* In the case of *Ashe v. Locke*, a nullity a former certificate made as reported in *O'Leary's Law of* under Goulbourn's act, sent down a *Tithe Rent-charges*, 177, it appears sole commissioner to effect a new that the Privy Council, treating as composition.

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awarding as the amount of composition *for all tithes whatsoever within* said parish, the annual sum of £965. 11s. 10d., and certifying, that of this sum, £692. 6s. 2d. was due to the Rev. Richard T. Rothe,\* rector of one part and vicar of the other part of said parish, and that £273. 5s. 8d., the residue of said sum of £965. 11s. 10d., was due to his Grace the Duke of Devonshire, as lay impropriator of the rectorial tithes of that part of the parish, whereof the Rev. Mr. Rothe was vicar; and said certificate of the 11th of April, 1834, referred to the former certificate of 26th of April, 1826 (and to a corresponding applotment), as compounding for the tithes payable to the incumbent.

The petition then stated, that, under the first certificate, the sum of £4. 19s. was applotted on the lands of Outlagh, and £9. 17s. 9d. on the lands of Shanlaragh; and that, under the second certificate, there was applotted the sum of £6. 1s. 11d. on the former denomination, and £9. 18s. 5d. on the latter denomination; and that the Duke claims the two latter sums, and threatens to take legal proceedings to enforce payment thereof; and that the petitioner is aggrieved thereby, inasmuch as he has paid to the incumbent the sums applotted on these lands (under the former certificate), as for the rectorial and vicarial tithes; and that the certificate and applotment made by the said Kidd were illegal, informal, and void.

And the petition prayed, "That the second certificate might be declared null and void, and that the petitioner's said lands of Outlagh and Shanlaragh might be declared to be liable to no further rent-charge than three-fourths of the sums respectively applotted on them under the first certificate."

The petition had been filed on the 29th day of January, 1839, and it was verified by the affidavit of the petitioner; and now the matter of the petition was moved by Mr. Collins, Q.C., with whom was Mr. M. Longfield. They were both heard at considerable length.

Mr. Sergeant Greene and Mr. Bennett, Q. C., appeared on behalf of the Duke of Devonshire, but they were not called on to reply.

The COURT,† having referred to the 16th section of the act, held that, upon summary petition, there is not any jurisdiction to declare any certificate null and void. That when an individual landholder presents a petition under that section, the court can do no more than to cause the certificate and applotment to be amended, so far as relates to the amount assessed on the particular lands of the petitioner; and that the certificate and applotment so amended are, as to all the other lands in the pa-

\* He was the successor of the Rev. Mr. Warren.

† WOLFE, Chief Baron, and RICHARDS, Baron.

rish, to remain in full force. The first part of the prayer, therefore, could not be granted; and as to the second part of the prayer, which sought to *reduce* the amount assessed on the petitioner's lands under the second certificate and applotment, the court must refuse that also; because the case made by the petitioner himself was, that the first certificate is valid; and, if so, then the second certificate and applotment are absolutely null and void, and, therefore, the petitioner cannot be injured by them. But, in truth, what the petitioner calls on the court to do is, to decide, on summary petition, between two conflicting certificates, a thing which it is impossible to do under the 16th section of the act.

Application refused, but without costs.

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*Saturday, May 11th.*

#### JUDGMENT CREDITOR—SURPLUS FUND—MORTGAGE.

MACKAY v. MARTINS.

Mr. T. K. LOWRY moved that the Accountant-General do draw on the Bank of Ireland, in favor of the plaintiff or his attorney lawfully authorised, for the sum of £201. 8s. 4d., remaining in bank to the credit of this cause. It appeared, from the plaintiff's affidavit, that the bill had been filed to foreclose a mortgage; that the mortgaged lands had been sold, under the decree, for payment of the plaintiff's demand, including principal, interest, and costs; and that, after payment thereof, there being no prior incumbrances, there was a clear surplus of £201. 8s. 4d. remaining in bank from the proceeds of the sale. Subsequent to the date of the mortgage, the plaintiff had lent the defendants a further sum of £228. 15s. 6d. upon their bond, on which judgment had been entered in Hilary Term, 1838, which had been revived in the present Easter Term, and the whole amount thereof, with interest, was still due. Under these circumstances, counsel submitted, that as the judgment, which was subsequent to the mortgage, could not have been proved under the decree to account, and as the plaintiff would have been entitled to a receiver, under the 5 & 6 W. 4, c. 55, over the lands upon which this judgment attached, if they had not been converted into money, until the amount of the judgment was paid off, the surplus remaining in bank should be disposed of in the same way by the court.

Where there was a clear surplus fund in court, which had been produced by a sale under a decree, the court, on motion of a subsequent judgment creditor, granted a reference to the Remembrancer, to inquire and report who was entitled to the surplus, and whether the applicant had any, and what lien upon it; and if so, whether there was any, and what prior lien thereon.

PENNEFATHER, B.\*—I think the application is a reasonable one; but, as there may be other judgment creditors subsequent to the date of the

\* *Solus.*



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mortgage, and prior to the plaintiff's judgment, refer it to the Remembrancer to inquire and report who is entitled to said sum of £201. 8s. 4d., and whether the plaintiff has any, and what lien thereon; and, if so, whether there is any, and what lien on said sum prior to the plaintiff's

### PRACTICE—RECEIVER—LETTING LANDS.

SEALY, Petitioner, MUNNS, Respondent.

An affidavit, made by a receiver in support of an application for liberty to let lands, must shew clearly that the lands are not in the possession of under-tenants.

Mr. ROGER WALKER moved to make absolute a conditional order, made in this cause on the 22d of January, for letting part of the lands in the possession of the respondent. The receiver, in his affidavit, stated that he believed the respondent to be in receipt of the rents and profits of the lands sought to be let, and that the other lands, over which he was appointed, were not sufficient to pay the debt.

Mr. *M. Baker, contra*.—This affidavit is not sufficient, it does not state that the respondent is in possession of the lands. They may be let on lease to undertenants.

An order for letting lands will not be made upon consent.

PENNEFATHER, B.†—It must be made to appear clearly who is in the actual possession of the lands, otherwise a party might be turned out without any notice (a).

Mr. *Baker* then applied that the lands might be let to the respondent, and that it might be referred to the Remembrancer to ascertain what would be a fair rent for the respondent to pay.

Mr. *Walker* stated that the petitioner was willing to consent to this.

PENNEFATHER, B.—The court never makes an order for a letting on consent. No rule.

† *Solus*.

(a) See Acc. *Anonymous*, 6 Law Rec. (2d ser.) 251.

## CHANCERY.

Tuesday, April 16th, 1839.

## LIMITATIONS—INTEREST.

BYRNE and wife v. ROBINSON and others.

This was a suit to raise a charge of £416, secured on certain lands. The charge had been established, and the question at the present hearing of the cause was, whether the plaintiffs were entitled to *nineteen years'* interest on that charge, or whether 42d section of the late statute of limitations, 3 & 4 W. 4, c, 27, barred their right to more than *six years'* interest?\*

No more than six years' arrears of interest of money charged on lands can be recovered, tho' the deed creating the charge vested the lands in trustees to secure it; and though the defendant held possession with knowledge of the trust.

\*3 & 4 W. 4, c. 27.

The 24th section of this statute provides that no person claiming any land or rent *in equity* shall bring a suit to recover it, after the time when, if entitled *at law*, he might have brought an action.

Section 25th.—“Provided always, that when any land or rent shall be vested in a trustee, upon any *express trust*, the right of such *cestui que trust*, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration; and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him.”

The sections intervening between the 25th and the 42d were not involved in the argument.

Section 42d.—“And be it further enacted, that no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy,

“or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same, in writing, shall have been given to the person entitled thereto, or his agent, signed by the person to whom the same was payable, or his agent: Provided nevertheless, that where any prior mortgagee, or other incumbrancer, shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover, in such action or suit, the arrears of interest which shall have become due, during the whole time that such prior mortgagee or incumbrancer was in such possession, or receipt as aforesaid, although such time may have exceeded the said term of six years.”

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Settlement,  
1798 : power  
to charge.

Deed of 1810,  
charging the  
lands with  
£416, and  
interest.

Decree to ac-  
count.

The facts were as follows—The plaintiff, Mrs. Byrne, was the sister of the defendant Robinson. It appeared, that on the marriage of their father and mother (Thomas Robinson and Anne Buchanan), a settlement was executed, bearing date 28th July, 1798, whereby certain lands of Thomas Robinson, and also certain lands of Anne Buchanan, were conveyed to trustees, in trust for Thomas Robinson, for life, then for the said Mary Anne for life, remainder to the children of the marriage, in such shares as Thomas Robinson and Mary Anne, or the survivor of them should appoint, or in default of such appointment, equally.

The marriage took place. The defendant Robinson, and the present Mrs. Byrne, the plaintiff, were children of that marriage.

In 1811, Mary Anne, the wife in the settlement of 1798, died.

In 1819, Thomas Robinson, the husband in the settlement of 1798, having survived his wife, executed a deed in pursuance of his power of appointment, and thereby charged all the said lands with the sum of £416, payable to the present Mrs. Byrne, the plaintiff, within twelve months after his own decease, *with interest thereon, payable from the date* of this deed of 1819, and conveyed the lands to trustees, for the purpose of securing that charge.

In 1820, the present defendant, Robinson, was put into possession by his father, the said Thomas Robinson, of the greater part of his mother's portion of the lands included in the settlement of 1798.

Thomas Robinson afterwards sold and disposed of all the remainder of the lands in the settlement of 1798, to other persons, also made defendants; and in the year 1823, was discharged as an insolvent debtor. In 1834 he died.

The bill in the present suit prayed an account of the rents of all the lands in the settlement of 1798, and that out of the rents so received, or by a sale of the lands, the plaintiffs might be paid the sum of £416, with interest thereon from 1819.

The defendant Robinson, by his answer, insisted that he had no notice, and had never heard of the settlement of 1798; that he now believed that settlement to have been *post-nuptial*, and consequently, not binding on his mother's property, of which, he insisted he had been put in possession in 1820, on attaining his age, as heir-at-law of his mother, and in no other right.

The cause was heard, and an issue was directed to ascertain whether the settlement of 1798 was in fact a *post-nuptial* settlement, as alleged by the defendant, or not. This issue was tried, and a verdict for the plaintiff, establishing that the settlement of 1798 had been duly executed before the marriage.

The cause again came on to be heard on the Judge's certificate, when a decree was pronounced, directing an account of the rents received by the defendants since the year 1820, and also directing an account of

what was due to the plaintiffs for principal and interest, on foot of the deed of 1819.

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In the Master's office, the defendant Robinson pleaded the late statute of limitations, in bar of the plaintiffs' right to more than six years' interest. The Master, in his report, reserved the question as a special point for the court, and reported, that if the court should think that the statute was not a bar to the plaintiffs' claim to more than six years' interest, then £836 would be due to them, but if the court thought otherwise, then £580 only would be due.

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Report : Special point : interest, how far back.

The cause now came on upon the Master's report, and the only question was the special point reserved by the Master.

Mr. *Blackburne*, for the plaintiffs.—We are entitled to interest from the date of the deed of 1819, notwithstanding the statute of 3 & 4 W. 4, c. 27, the limitation in that statute does not affect parties who stand in the relation of trustee and *cestui que trust*. By the deed of 1819, the property was vested in Stringer and Buchanan as trustees, to secure our charge of £416. The defendant intruded on those trustees *with knowledge of the trust*, and we are therefore entitled to make him account as if he were the trustee named in the deed. *Salter v. Cavanagh (a)*, decided in this court, shews that the limitation in the 42d section of the statute does not apply to a case of trust like the present. The form of the decree here, by directing an account from 1819, precludes the party from going into the question now raised.

Mr. *Warren*, for defendant Robinson, submitted, that the statute was an express bar to the recovery of more than six years' interest.

Mr. *John S. Townsend*, on same side.—The decree does not conclude the present question on the statute. The plaintiffs are suing not for the rents but for arrears due on foot of a charge on the rents ; and therefore the decree, which directs an account of the rents from 1820, has nothing to do with the present question, which was not indeed raised on the original hearing, and could only have been raised in the Master's office.

As for the 42d section, it bars the plaintiffs from recovering more than six years' arrears of interest. The plaintiffs' money is "charged upon and payable out of land," and therefore, within the 42d section. It is contended, that the 25th section takes this case out of the operation of the 42d. Now, as to that, we submit that the 25th section is conversant merely about questions of title, but has nothing to do with questions of *arrears*. Indeed the first forty sections are conversant merely about title, and therefore, none of the various exceptions to be found in

(a) Chancery, 7th May, 1838, Reg. Lib. fol. 156.—See the Lord Chancellor's observation as to this case, *post* 336.

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them, can at all apply to the 42d section (a). If Sugden's opinion be right, then even lunacy or infancy will create no exception to the general rule laid down in the 42d section. The only exceptions to that rule are laid down by the 42d section itself, and are confined to cases where prior mortgagees or incumbrancers are in possession. Indeed the general policy of the legislature was, to put a general bar to the assertion of *title* after twenty years' adverse possession, and to the recovery of a greater amount of arrears than six years' (b). As to cases of *title*, the first 40 sections supply many exceptions, but as to cases of *arrears*, the 42d section supplies the only exceptions, and the present claim does not fall within either of those exceptions. Besides, this is not a case of express trust, within the 25th section. The defendant Robinson does not derive or claim through the trustees of the settlement of 1798, or the deed of 1819. On the contrary, Robinson claims adversely to them, and insists on his right as heir-at-law of his mother, in which capacity he has held since 1820, when he attained his age. Robinson can only be regarded as a trustee by implication of law, and that is not the species of trustee contemplated in section 25. Even upon the late statute, a Court of Equity would not give more than six years' arrears in a case of this kind (c). In short, the 42d section imposes a general and positive bar to stale demands of arrears, and the mind of the legislature was to allow no exceptions but those specified in that section. The legislature are more opposed to suits for old arrears than to suits for the establishment of old dormant titles.

Mr. W. Brooke, Q. C., in reply.—Mr. Townsend's distinction between suits on the title and suits for arrears would be entitled to great weight, but in *Salter v. Cavanagh* the argument was the same as here, and your Lordship did not accede to the view of the statute now contended for. In *Townsend v. Townsend* (d) the party had no notice of the trust. Here we have proved notice. *Phillips v. Moneys* (e) was a case on the 40th section, which is in *pari materia* with the 42d. The Lord Chancellor said in that case, that the statute did not apply, the suit being not for a legacy, but to compel a party to account for a breach of trust. Possession with knowledge of the trust makes the party a trustee, *Adair v. Shaw* (f).

LORD CHANCELLOR.—I am disposed to be of opinion with the plaintiff in the general argument, and I shall give my decision in a day or two. However, in *Salter v. Cavanagh* the point was, that when the trusts appear on the face of the instrument, any person deriving under those trusts having notice and not deriving by any *adverse* title, will not be entitled to avail himself of the limitation.

(a) See Shelford's real Property, p. 193, note; also Sug. on Vend. p. 411.

(b) See Real Prop. Comrs. Rep.

(c) See Shelford on Real Prop. 156. note.

(d) 1 Brown C.C. 551.

(e) 2 Myl. & Cr. 309.

(f) 1 Sch. & Lef. 262.

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LORD CHANCELLOR.—In 1798 a settlement was made, on the marriage of Thomas Robinson and Anne Buchanan, by which, a power of appointment was vested in Robinson. In July, 1819, he executed a deed in pursuance of his power, and by that deed charged £416 13s. 4d., on all the lands in the settlement.

A decretal order has been made, establishing that charge against the lands which have been in possession of the defendants, and an account of the rents has been directed.

The report states, that £1800 has been received by Robinson, and £300 by the other defendant. Now, as to the charge of £416 13s. 4d., the principal was not to be paid during the life of Thomas Robinson, but the interest was, according to the deed, to commence from 1819.

As to the validity of this charge, there is no doubt. That is settled by the former decree. The only question is as to interest. This question arises under the 42d section of 3 & 4 W. 4, c. 27.—[His Lordship, after reading the section, proceeded]—What the plaintiffs seek to recover here certainly comes under the words “arrears of interest in respect of money charged upon land,” and this section is express against recovering more than six years’ of such arrears. I cannot find anything in the statute to exempt this case from the operation of those words. In the 42d section there is no exception which would apply to this case. But it is contended that the 25th section takes the case out of the operation of the 42d section. I find no sufficient ground to give that effect to the 25th section. I would be disposed, if I could, to give the plaintiffs the benefit of the construction they contend for, if I could think that the act would bear that interpretation. The conduct of the defendant has been most unjust; he denied notice of the settlement of 1798, and alleged it was *post-nuptial*. He put the parties to the expense of trying that question. But on the whole of the statute, I am obliged to adopt the conclusion that the 25th section will not save the case from the operation of the 42d section. I am not obliged to decide, that the 25th could never bear upon the 42d, for even supposing it could, I should have great difficulty in saying, that the party here is an express trustee or deriving under one.

I think the decretal order does not conclude the question. The decree directs an account of *rents* from 1820, but it does not follow that *interest* should be calculated from that period.

I must therefore rule the special point, very reluctantly, with the defendant. I am very sorry to stint the relief to the plaintiff. I had a very strong impression that I would be able to struggle with the point relied on by the defendant, but I have been unable to do so.

Thursday, May 2d.

# LANDLORD AND TENANT—COVENANT FOR RENEWAL.

WALLACE and others v. PATTEN.

Where a lease for lives renewable for ever expired without renewal, and the landlord brought his ejectment; the tenant taking defence, and disputing his landlord's title, is not of itself sufficient ground for refusing him relief in equity.

Lessor being himself a tenant under a lease for lives renewable for ever makes a sub-demise, and covenants that every life added by his own landlord shall be also added to the sub-demise.—On obtaining a new life in his own lease he ought to give notice to his tenant that he is ready to renew.

If lease for lives renewable for ever expires without renewal, and landlord brings his ejectment, the tenant ought not to dispute his landlord's title, but should give a consent for judgment, and file his bill for a renewal.

Defendant, in a suit for a renewal, may have so misconducted himself as to be made to pay the costs, but, not having acted dishonestly, was held entitled to the usual terms.

Suit for renewal. The questions discussed at the hearing were, *first*, whether the tenant had lost his right of renewal by *laches*: *secondly*, whether there had not been such a disclaimer by the tenant as amounted to a refusal to renew, so as to deprive him of his right now to enforce a renewal: *thirdly*, whether the tenant having contested an ejectment brought by his landlord, and disputed his title to the lands, was ground for now denying him relief: *fourthly*, whether the terms of the covenant in this case differed from an ordinary covenant for perpetual renewal, so as to alter the relative duties of the landlord and the tenant.

The bill stated that Robert Patten, the lessor, in 1764, held the lands of Tullyvallen, under a lease granted to him by Alexander Hamilton, for three lives, viz., Robert Patten, James Patten, and William Patten, in which was a covenant for perpetual renewal, and that being so seized he made two several sub-demises of different parts thereof, dated, respectively, 22d January, 1764, and 23d June, 1765; the first to one Samuel Harris, and the other to one John Tilly. It was the renewal of these sub-demises that was now sought.

The passage containing the covenant for renewal was similar in both the sub-leases in question, and was as follows: "To hold the said demised premises to the said lessee, his executors, administrators and assigns, for the lives of Robert Patten, James Patten, and William Patten, and the longest liver of them, and for and during the life and lives of all such other person and persons as should be thereafter for ever inserted in the grand lease of said lands from Alexander Hamilton, Esquire, which said Robert Patten does hereby for himself, his heirs and assigns, covenant to do."

The lessees' interests in both leases became vested in the plaintiffs, and the bill prayed renewals of both leases, "pursuant to the covenants for perpetual renewal in said leases respectively contained."

Mr. Blackburne, Q. C., and Mr. W. Brooke, Q. C., for the plaintiffs, cited *Flood v. George* (a), where the tenant had questioned the landlord's title at law, yet the court decreed a renewal; and *John v. Armstrong* (b), where it was held that a landlord, in a case like this, ought to make a distinct demand of the fines.

(a) Lyne on L. App. 110.

(b) L. & Gould, tem. Plun., 392, 405.

Mr. *Warren*, Q. C., Mr. *Blake*, Q. C., and Mr. *Plunkett*, for the defendant.—The tenant, by disputing his landlord's title at law, loses his right of renewal; *Fitzsimon v. Burton* (a).

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Mr. *Ross S. Moore*, in reply.—In *Burton v. Fitzsimon*, the landlord had called on the tenant by notice to renew, and what Lord Redesdale meant was merely, that neglect to attend to that notice within a reasonable time might amount to a refusal to renew, and a forfeiture of the right. In *Allan v. O'Keeffe* (b), Baron Richards said, that where a landlord lies by, trying to entrap the tenant into a forfeiture, he would not be entitled to costs.

The LORD CHANCELLOR, in giving judgment, said—There is no dispute here about the covenant to renew. The only question is whether the plaintiffs have lost their right of renewal. So far as the neglect is concerned I think it was mere neglect, within the meaning of the tenantry act. The tenant here was not in the ordinary case of being obliged to look after the renewal: the duty lay upon the landlord to ascertain who were the lives, and who was the tenant. The covenant is made by Robert Patten, who himself holds under a superior landlord, by lease for three lives renewable for ever. He makes a sub-demise, and the habendum is "to hold for the same three lives, and for such other lives as shall be inserted in the grand lease, which the said Robert Patten hereby covenants to do:" therefore, it is only when new lives were inserted by his own landlord that he was in a situation to perform the covenant. That occurred in 1813. The duty of Patten then, on obtaining his own lease, was, to call on the tenant to renew. He does nothing; but, in 1836, he proceeds to evict the interest of the tenant. He calls on the tenant, and brings a legal person with him as a witness, and then he does not ask him to disclose by what title he holds the lands, nor does he call on him to renew, but he simply requires him to give up possession. The tenant, Mr. Wallace, was not aware of the nature of his own title to the lands, and told Patten he had nothing to do with the lands, and did not know who he, Patten, was: this, it is contended, was a sort of disclaimer; but I cannot give it that importance. Then the only point remaining in the case is the effect of the resistance made by the tenant at law. It was the duty of Wallace to have given a consent for judgment, and then to have filed his bill; instead of that he puts his landlord on proof of his title. But then it is said, on the part of the tenant, that he was unable to find out who was the person to grant a renewal, there being disputes in Patten's family. In order to file a bill he had a right to find out, in the best way he could, who

(a) Finlay on Renewals, 312.

(b) Irish Exr. 28 April, 1839.



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should be the parties to it. He was wrong in seeking that information in the way he did, but that does not disentitle the party to the benefit of the covenant for renewal. The case of *Fitzsimon v. Burton* has been cited, but a distinction is properly taken by Mr. Moore between that case and the present. That observation of Lord Redesdale was founded on the provision of the act, that if the tenant *is called on by notice to renew*, and he does not do so within a reasonable time he forfeits his right, and Lord Redesdale thought, that after a notice of that kind, the tenant contesting his landlord's title at law was tantamount to a refusal to comply with the previous notice: I do not think it, however, necessary to go into that question: it is decided, by the highest authority, that it must be clearly ascertained that the tenant has been guilty of *laches, amounting to fraud*, to disentitle him. In England the subject of renewal is differently understood. In this country, this sort of interest has been considered equivalent to a perpetual interest. They are made the subject of family settlements, and dealt with like fee-simple property. I, for one, would not carry the eviction of such interests any farther than the cases have decided.

Besides, there are a number of persons in this case having an interest in the renewal of this lease. It was only one of them, Wallace, who took defence. The others were not in fact served with the ejectment, and never took defence. It would be impossible for me to consider the act of one, only, to be a forfeiture as to the rest. As to the costs, the plaintiffs must come in on the usual terms. A landlord may, undoubtedly, so misconduct himself that he will not only not get costs but might be made to pay them; but I do not think there is any proof that the defendant here has acted dishonestly, or that he has been swearing dishonestly, as has been suggested, or that he has disentitled himself to the ordinary terms.

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*Reg. Lib., fol. 178, May 2d, 1839.*

The decree declared the plaintiffs entitled to renewals of the two leases, for the lives in the last renewal of the lease of 1763, obtained by the defendant from Alexander Hamilton, which renewal bore date 11th March, 1813, upon payment of all arrears of rent and fines properly payable, &c.; and decreed the plaintiffs to pay to the defendant, on execution of such renewal, his costs in the cause, properly and reasonably incurred.

*Thursday, May 2d.*

RENEWAL—EVIDENCE—PRACTICE—COSTS.

HAMILTON v. PATTEN.

The bill prayed the renewal of a lease in pursuance of a covenant for perpetual renewal.

The original lease was said to be dated 1st November, 1768, and was now lost. The proofs of it consisted in a recital contained in a deed dated 14th October, 1769, and other circumstantial evidence. It had never been renewed, and expired about the year 1796.

The defendant John Patten had brought an ejectment. The plaintiff Hamilton had taken defence, and a trial was had at Armagh Summer Assizes in 1837. On that trial, Patten gave in evidence a notice which had been served on him by Hamilton, and which was to the following effect:—

“Lessee of PATTEN v. HAMILTON—Sir, take notice that defence is “not taken in this action in order to dispute your title as assignee of the “reversion of the lease of 1768. If you will say in writing that you are “assignee of the reversion, I will give a consent for judgment; and if “you give no answer to this notice, I will only take such course at “the trial as to prevent the issuing of immediate execution.”

The notice was taken at the trial as an admission of Patten's title, and there was a verdict for the plaintiff in ejectment.

Hamilton having now filed his bill here, several defences were relied on. *First*, the defendant disputed that the alleged lease of 1st Nov. 1768, had ever existed. *Secondly*, that the words of the recital\* contained in the assignment of 14th October, 1769, did not necessarily import a covenant for perpetual renewal. *Thirdly*, supposing the lease of 1st November, 1768 to have existed, and to have contained a covenant for renewal, that still there was no proof that the defendant was the assignee of the reversion, so as to be bound by the covenant.

The case was argued by Mr. *Blackburne*, Q. C., Mr. *W. Brooke*, Q. C., and Mr. *Andrews*, for the plaintiff, who contended, *First*, that the recital in the deed of 14th October, 1769, and the other proofs in the cause were sufficient to prove the existence of the lease of 1768, and *Secondly*, the nature of the covenant; and cited *Athinson v. Pils-*

If defendant: in a suit for a renewal file separate answers, where their defence is the same, the Court will not make the usual decree giving the defendants their costs, but will disallow the costs of separate proceedings.

In a suit for a renewal, though the defendant be not proved to be assignee of the reversion, so as to compel him to renew, yet a case may be made for a perpetual injunction to restrain him from executing his *habere* at law.

If a party uses a document as evidence in a court of justice, the whole of it will be evidence against him on a subsequent occasion.

\* The deed of 14th October, 1769, recited the *habendum* of the original lease of 1st November, 1768, thus, “to hold for the life “and lives of the said, &c., and the “longest liver of them, and for “and during such other life and “lives as shall be for ever there- “after inserted therein, the said les- “see his heirs and assigns, paying “a fine of, &c., for adding or insert- “ing every new life.”

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worth (a); *Brown v. Tighe* (b); *Lessee of Kean v. Fleury* (c). Thirdly, they submitted that there was sufficient proof of Patten being assignee of the reversion, and they contended that Patten, having given in evidence at the trial the notice alleging him to be the assignee of the reversion, he could not now deny that fact, and cited on this point *Brickell v. Hulse* (d); *Boardman v. Jackson* (e); *Randle v. Blackburne* (f).

Mr. Warren, Q.C., Mr. Blake, Q.C., and Mr. Plunkett, for the defendant John Patten.—*First*, the evidence offered in disproof of the lease of 1768 is sufficient to counterbalance that of the plaintiff. *Secondly*, the words of the recital are not as strong as those in *Kenny v. Ford* (g), or *Nangle v. Smith* (h). *Thirdly*, there is no evidence that defendant is assignee of the reversion, supposing the lease to have existed. The notice produced at the trial is only evidence that those allegations had been made, and not of their truth; *Brickell v. Hulse* has no analogy with the present case. *Boardman v. Jackson* is only a dictum, and does not go the length contended for, *Tyssen v. Clarke* (i), and *Ford v. Grey* (k), are authorities to shew that this recital in a deed to which we were no parties is not evidence.

The LORD CHANCELLOR intimated in the course of the argument, that even if Patten were not conclusively proved to be assignee of the reversion, so as to compel him to execute a renewal, yet, there might be a case here for enjoining him by a perpetual injunction from executing the *habere* at law.

LORD CHANCELLOR.—On the whole case, I think the parties entitled to a renewal. The case of *Kenny v. Ford* has no effect on my mind. That case is not a very distinct one, the reasons are not given, nor can I collect from that case, what was the construction put by the court on the covenant. It does not appear whether the court thought it a covenant for one renewal, or for a renewal on the death of each of the three first lives. The certificate is silent as to that. It appears to me perfectly clear, that the covenant here must have been a covenant for perpetual renewal.

Then, as to the question whether the lease of 1768 did exist, and was

(a) Vern. & Seri. 157.

(b) Hayes 163.

(c) Batty, 657.

(d) 7 Adol. & Ell. 454.

(e) 2 Ball & B. 386.

(f) 5 Taunt. 245.

(g) Batty 537.

(h) 6 Law Rec., N. S. 332, S. C. Jebb v. Symes. 199; S. C. ante. 119.

(i) Loft. 496.

(k) 1 Salk. 285.

made by a person having power to make it.—Robert Patten, the father, had certainly been granting perpetuities. Then, in 1767, on the marriage of his son William he entered into articles, by which he settled Tullyvallen to the uses of that marriage. If those articles were not afterwards derogated from, John would not have had any power to execute this lease.

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Certainly, it is an extraordinary thing, the articles of 1767 staring him in the face, that he should have executed the lease of 1768. But these articles of 1767 were executory; certain things were to be done; it might happen that some arrangement between the parties was come to.

Then, on 17th November, 1768, a lease is executed by Wm. Patten to John Patten, for three lives, and three lives only, and for the same lives as those in the lease of 1st November, 1768. That certainly is very extraordinary.

A suspicion is naturally excited, that there was some dealing between the members of the Patten family, derogating from the articles of 1767, and I think there is even more than a suspicion that such was the fact, and the parties have gone on regularly as if under the lease of 1768.

Then it is proved that the defendant has made frequent admissions of title in the plaintiffs to a perpetual renewal. He says, he then thought their title was derived from William. But their title appeared on the registry. They also set forth their title in the affidavits used in the proceedings at law. There was no concealment. However, it is true that he may have confounded the title of Wallace with that of the plaintiffs.

Then, in 1813, he obtains a renewal himself from his superior landlord, and says nothing to his landlord about the articles of 1767, for he says merely, that the lands came to him by *mesne assignments*. If the facts had been stated to the landlord, he might have thought it inexpedient to grant him a renewal until he shewed his title.

On the whole, we have the person who is entitled to the renewal, and we have the person also, I think, who is bound to renew. Then we have possession acted on for a great length of time, as under the lease. The plaintiff would have had title by this time, by continued possession, but what prevents him from having title against the defendant is, that he has been a person receiving the rents, as under the lease of 1768.

The decree must be made without prejudice to the rights of any person claiming under the articles of 1767.

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Mr. Napier having appeared for the defendant William Patten, remainderman, under a settlement,—The plaintiff's counsel now submitted, that under the circumstances of the case, the court would not give the de-

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defendants their costs. They submitted that the defendants had vexatiously disputed the right to renew, and had put in separate answers to accumulate costs.

LORD CHANCELLOR.—I think they are entitled to the usual terms, except as to the separate proceedings, which appear to have been unnecessary. It is not to be imputed as blame to them, that they have disputed your right to renew. There was ground for a reasonable doubt as to your right. I will direct the ordinary accounts, and give the defendants *such costs as have been properly and necessarily incurred, the costs of the separate proceedings not to be included.*

*Reg. Lib., fol. 186—6th May, 1830.*

The decree declared the plaintiffs entitled to a renewal, in accordance with the recital in the assignment of 14th October, 1769.

As to the costs, the decree was as follows:—

And let plaintiffs pay to defendants their costs in this suit, properly and reasonably incurred, up to and including the hearing in this cause, and let the costs, if any incurred at law in the ejectment cause, and not paid by W. B. Wallace and James Twigg, defendants, be paid to the defendant John Patten, by the plaintiff, when taxed and ascertained, but so that defendants John Patten and Wm. Patten shall have such amount of costs, and no more, as if they had taken defence together and joined in one answer and in the subsequent proceedings.

*Saturday, June 1st.*

#### PRACTICE—TAKING ANSWER OFF FILE TO PROSECUTE FOR PERJURY.

DALY v. TOOLE.

The application to take an answer off the file, in order to prosecute for perjury, is an application to the discretion of the court, and will not be granted unless some ground be laid to enable

Motion for liberty to take the defendant's answer off the file, in order to ground an indictment for perjury against him.

Mr. *Walter Burke*, for the motion.—The practice of the Exchequer is different from that of the Court of Chancery in this respect. In the Exchequer the court considers it an application to its discretion, and requires a special ground to be laid. In this court it has been ruled to be laid to enable the court to judge of the propriety of such a proceeding.

be *ex debito justitiæ* to grant the application, *Stratford v. Greene* (a). Lord Manners decided that case on full deliberation, and after consulting with the Court of Exchequer on the reasons of their practice. In *Curtis v. Anon.* (b), and *Swift v. Quinlan* (c), Sir William M'Mahon treated the practice as settled, and said the application was *ex debito justitiæ*.

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Mr. John Martley, Q. C., was on the other side.

The LORD CHANCELLOR, after observing that in the present case the affidavit did not state that the informations had been sworn, expressed a very strong opinion that the practice of the Exchequer was right, and intimated that he would refuse the motion with costs. But on a subsequent day,

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His Lordship again referred to the application, and said that he had conferred with his Honor the Master of the Rolls on the subject, and finding that the impression had been very generally entertained, that the practice of the court had been to grant the application, he would vary his order as to the costs, but remained of opinion that the application ought to be refused. As to the right of a party *ex debito justitiæ* to take an answer off the file in order to prosecute for perjury, his Lordship observed—It has been understood latterly, that the practice of this court is different from that of the Exchequer, and it is said that a party, by merely asking for it, has a right *ex debito justitiæ* to have the answer taken off the file to prosecute for perjury; but it appears to me a perversion of justice to allow the proceedings, at the mere will of the party, to be converted from civil into criminal proceedings. Why should the jurisdiction be so changed? Then, what is the ordinary course in this court, where a defendant has committed a *mistake* in his answer, if he applies for leave to take it off the file? The court will not do so, but allows him to put in another. Then, the second answer may be shewn to prove that the party has not been wilfully forswearing himself.

A party would come under very heavy disadvantages to the hearing of the cause, where a prosecution for perjury is pending against him, and yet, he may be afterwards acquitted. Or even if there was a conviction, and afterwards a decree in this court for the defendant, I think that would create a conflict between the two jurisdictions, which would not tend to the advancement of justice.

(a) 1 Ball. & B. 294.

(b) 1 Hog. 132.

(c) 1 Hog. 133.

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A party may have ground to come in here to take his antagonist's answer off the file, in order to charge him with the responsibility of false swearing, but if I am to allow a party as matter of mere right, to come in here at any time to take an answer off the file to prosecute for perjury, I would be making this court the instrument of private malice, and of hindering private right. I refused the motion with costs. However strong my opinion of the impropriety of the application, yet, as there was ground for thinking that the practice of this court had been to grant the application as a matter of right, I ought not to have given costs. The practice in the Exchequer is quite in accordance with my view. I have a very early recollection of the opinion of that court. I recollect Lord Avonmore expressing the view of the subject which I have now expressed. He thought it a perversion of justice. Therefore, I wish it to be understood, that I will not grant any application to take an answer off the file, unless some ground is laid, to enable the court in the exercise of a sound discretion to judge of the propriety of such a proceeding.

Motion refused without costs.

Monday, June 10th.

#### RENEWAL—CURRENCY ACT—PRACTICE—COSTS.

FITZGERALD v. CAREW.

Under a lease of lands in Ireland for lives renewable, dated in 1695, reserving a rent of £53 *lawful money of England*, and a fine of half-a-year's rent on the fall of each life, the rent and fines are payable in late Irish currency.

Where there is a lease with covenant for renewal, the landlord cannot insist that the tenant shall pay collateral debts as a condition of granting a renewal.

In a suit for a renewal, if it appears that the tenant has been guilty of any *laches* he must in general pay the landlord's costs: but if the tenant was guilty of no *laches* and the landlord refused a renewal on insufficient grounds, he will be decreed to pay the tenant's costs.

Suit for renewal.—The plaintiff before filing his bill, had tendered a draft renewal lease for the approval of the defendant, and 200 sovereigns for arrears of rent and fines, which the defendant had refused.

The case made by the defendant was, *first*, that in the original lease, which was dated 3d October, 1695, the rent was reserved in these words "*£53 lawful money of England*;" and the fine in the same manner. He accordingly insisted that the rent and fines were payable in British currency, and that the sum tendered was insufficient. *Secondly*, he insisted that he had claims against the plaintiff on foot of certain judgments, which he ought in equity to pay before he could claim a renewal.

Sergeant Greene, Mr. T. B. C. Smith, Q. C., and Mr. Lentaigne, for the plaintiff.—The question as to the currency in which the rent and fines are to be paid is now settled on full deliberation, by *Neville v. Ponsonby* (a). *Kearney v. King* (b), shews that the currency must be

(a) 1 Law. Rec., 3d. Ser. Moore and Brady, 204.

(b) 1 B. & A. 301.

presumed to be that of the country where the instrument is drawn, *Sproule v. Legg* (a), is to the same effect. Then, as to the claim on foot of judgments, we admit, that if the defendant had proved his allegation, that those judgments were for sums formerly due out of the lands for rent and fines, he might have insisted on their payment. But that has been disproved, and it is settled that a collateral demand cannot be insisted on as a condition of granting a renewal, *Trant v. Dwyer* (b).

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Mr. Blackburne, Q. C., Mr. W. Brooke, Q. C., Mr. Blake, Q. C., and Mr. Hughes, for the defendant.

The question on the currency is certainly a very difficult one. The Barons of the Exchequer differed from each other in *Neville v. Ponsonby*. The question was raised as regards the effect of the statute\* upon solicitor's fees before Sir Edwd. Sugden (c). The doctrine in *Cooke v. Booth* (d), that receiving in mistake a lesser sum instead of a greater would bind the party for the future has been since entirely repudiated, *Baynham v. Guy's Hospital* (e), and afterwards in *Moody v. Matthews* (f). At all events it was a fair question for the defendant to raise. As to the demands on foot of the judgments, they were just debts, and connected with the defendant's claims out of the lands.

The LORD CHANCELLOR was against the defendant on both points, and said the question now was, whether in the present case he would make the ordinary decree as to the costs?

These cases (said his Lordship), where bills are filed for specific performance of a covenant for renewal, are of great importance, and require great consideration. They relate to estates which, though not in fact amounting to a fee-simple, are always considered interests in perpetuity. The court is to carry an even hand between the landlord who is bound to renew, and the tenant who is entitled to the renewal. If there be *laches* of a nature which does not amount to fraud, the tenant is nevertheless not disentitled to a performance of the covenant for renewal. The tenantry act in fact provides that. If the tenant has been guilty of any *laches* he must pay the costs, but unless there is some fraud on his part he is still entitled to a renewal. Here, there was no *laches* such as should induce the court to charge him with costs, nor any fraud, and he is clearly entitled to a renewal. Now, to say that he is to pay costs under such circumstances would not be just, and in fact I do not understand that to be pressed. But the question is, whether he is to get costs? It is the

\* 6 Geo. 4, c. 79.

(a) 1 B. & C. 16. (b) 2 Bligh N. S. 11, S. C. Dow. & C. 125.  
(c) L. & G. tem. Sug. 352. (d) Cowp. 819.  
(e) 3 Ves. 297. (f) 7 Ves. 177.



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duty of the court not to encourage the tenant to sleep on his rights, nor on the other hand, to encourage the landlord to resist a renewal without any just grounds. If the landlord was sure of escaping costs in all cases it would be of very injurious consequences.

Then, are the defences relied on by the defendant of such a nature as to subject him to costs? I take it to be settled, that even if the landlord has just demands against the tenant, but which are unconnected with the claim for renewal, yet, he has no right to insist that those demands shall be satisfied before he grants a renewal. *Trant v. Dwyer* settles that point; that was the unanimous decision of the Court of Exchequer, and was affirmed by the House of Lords. Lord Lyndhurst, who was then Lord Chancellor, expressed his entire concurrence with the Court of Exchequer.

Now, as to the claims made by the defendant here, and which he insisted should be satisfied as the only terms on which he would grant a renewal:—It is necessary for him to shew, that the demand he makes is really connected with what is due to him in respect of the lands. If judgments were passed in payment of renewal fines, and remained unsatisfied, he would have a right to take that into consideration on the clear ground that the rent and fines had not in fact been paid, but he has failed totally in establishing that fact; and it is shewn by his own books that the bond for £116, called Latin Fitzgerald's bond, was made up of totally different considerations, and I cannot avoid coming to the conclusion that there has been a management resorted to in order to prevent the truth being ascertained in that respect. Then there is the other, called Pierce Fitzgerald's bond. Bills were filed in this court in 1833, on foot of those demands. Answers were put in denying the liability of the present plaintiff; those bills were dismissed for want of prosecution. It is said that they were filed to save the statute of limitations, and that they were defectively framed. That would not account for allowing them to be dismissed. He might have amended those bills, and might have got any relief he was entitled to on foot of these demands, but he chooses to mix that up with the question of renewal, and he says "I will give no renewal unless you will pay me those demands." Neither as to one bond or the other has he entitled himself to bring them into question.

Now, as to the question on the currency, I quite go along with the Court of Exchequer. The Judges arrive at the same conclusion, although by different roads. The only dissentient opinion that can be collected from Baron Pennefather's observations is to this extent at the utmost, that if the question had been raised immediately after the proclamation of 1727, he would have found great difficulty in coming to a conclusion, but he agrees with the Chief Baron, that when the act of 1826 is considered it puts an end to the case. The parties have been

acting on the supposition that the contract was in Irish currency for more than a century. Is the party therefore justified in resorting to a claim of this kind? I am not now referring to the acts of the parties in order to construe the contract; under all the adjudged cases it must mean Irish currency; using the words "lawful money of England" makes no difference. Those words have reference to the *coin* not to the *currency*. Then the question is, whether that is to be allowed to be set up as a bar to a renewal?

On the whole, I have no difficulty in saying that the plaintiff is entitled to his relief; and with costs.

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*Reg. Lib.* 345 — 14th June, 1839.

Decree the rent of £53 a year reserved by the lease of 1695, in the pleadings mentioned, and the renewal fine of half-a-year's rent payable under the same indenture, on the fall of each life, to be payable in the late Irish currency, and decree plaintiff entitled to a renewal of said lease, upon payment of the sum due for rent, renewal fines, septennial fines and interest, &c. &c.

And let said defendant Thomas Maurice Carew pay to plaintiff his costs in this cause, &c.

Wednesday, June 19th.

# SOLICITOR—PRIVILEGE FROM ARREST.

LONGFIELD v. CARPENTER.

In re FITTON.

Mr. JOHN S. TOWNSEND moved to have Mr. Fitton, solicitor for defendant, Carpenter, discharged out of the custody of the sheriffs of the city of Dublin, having been arrested at the suit of John Aherne, plaintiff in an action in the Exchequer.

The affidavit of Fitton stated that he was arrested on the 13th June, inst.: that he had issued a summons to compel the receiver to account in the cause of *Longfield v. Carpenter*, in this court, and that the receiver not having accounted, he instructed counsel to apply to the Master for his certificate, with a view to an attachment: that on the day in question he was in the hall of the Four Courts, looking for his counsel, in order to the said application, when he was arrested, as above-mentioned.

If a solicitor be *bona fide* attending a motion or other proceeding in court for his client, he is privileged from arrest: but where he was merely looking for his counsel in court to consult him as to the course to be pursued in the cause, he was held not privileged from arrest.

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Mr. *Fitzgibbon*, for Ahearne, said, that the court was always unwilling to accede to these applications, and that here there did not appear to be any motion depending in the cause which required the attendance of the solicitor, and cited *Footé's case* (a), and *Gibbs v. Phillipson* (b).

Mr. *John S. Townsend*, in reply.—As to *Footé's case*, the solicitor was arrested at his own lodgings, and it did not appear that there had been any *bona fide* attendance in court. As to the case in 1 *Russ.* and *Myl.* the party was attending, not on a client's business, but his own, and the privilege is for the protection of clients. *Footé's case* was cited in *Fitzmaurice's case* (c), and there Lord Chancellor Hart expressed his dissent from the doctrine laid down in *Footé's case*, and said, "that though the business might have been done by a clerk, that did not make an exception." In *Kane's case* (d), the solicitor had attended in the register's office, to get out an order, and that was held, by Sir M. O'Loughlen, sufficient to entitle him to his privilege. The case of *Barry Collins* (e), shews, that though arrested on a writ out of another court, the application to discharge him may be made in the court where the privilege is claimed. As to there being no motion depending, the application for a certificate is made, without summons, in the Master's office, and is entirely to his discretion.

LORD CHANCELLOR.—I agree with Sir Anthony Hart that this is a pernicious privilege, and it protects the solicitor from the claims of his creditors. Here the attendance does not appear to have been such as would warrant my granting the present application. There does not appear to have been any motion depending. The solicitor appears to have been merely looking for his counsel, probably to consult him as to the course to be pursued. If there were a *bona fide* attendance in court the solicitor would be entitled to his privilege.

Motion refused, without costs.

(a) 2 Molloy, 530.

(b) 1 Russ. & Myl. 19.

(c) 1 Molloy, 512.

(d) Sausse & Sc. 81.

(e) Sausse & Sc. 73.

## ROLLS.

*Saturday, April 20th.*

## CHURCH LANDS—RIGHT OF SUB-LESSEE—ROYALTIES.

In the Matter of OWEN BYRNE and NICHOLAS BYRNE, Petitioners,  
 THOMAS HUGO, Respondent;  
 And of the Act of Parliament of the 6th and 7th W. 4, c. 99, s. 3.

This was a petition, under the 3d section of the 6th and 7th W. 4, c. 99, and stated,\* that by lease of 1st of July, 1820, between Thomas Hugo and William Hugo, then both of Droneen, in the county of Wicklow, of the one part, and the petitioners of the other part, they, the said Thomas Hugo and William Hugo, demised to the petitioners the town and lands of the Seven Churches and Killagola, with all the tenements and cottages thereon, situate, lying and being in the barony of Ballinacor and county of Wicklow, for a term of twenty-one years, with a *toties quoties* covenant for renewal to the petitioners, their executors, administrators and assigns, so often as the said Thomas Hugo and William Hugo should obtain a new lease or renewal from the Archbishop of Dublin; petitioners yielding and paying to the said Thomas Hugo and William Hugo the yearly rent of £15 9s. 9d. of the late currency of Ireland; and also paying for every renewal a proportion of any increased fine, rent, or expenses which they, the said Thomas Hugo and William Hugo should pay on obtaining their renewal from the See of Dublin.

That the interest of the said Thomas Hugo and William Hugo, under the said See, having become vested in the said Thomas Hugo alone, he, the said Thomas Hugo, pursuant to the provisions of the 3d and 4th of W. 4, c. 37, entitled, &c., applied to the Ecclesiastical Commissioners for Ireland, for the purchase of a perpetual estate and interest in the lands and premises held by him under the said Archbishop of Dublin, including, amongst others, the said lands so demised to the petitioners as aforesaid; and the said Thomas Hugo having complied with the provisions of the statutes in such case made and provided, by indenture, made the 27th day of January, 1837, between the Archbishop of Dublin, of the first part, the Ecclesiastical Commissioners for Ireland of the second part, and the said Thomas Hugo of the third part, the said Archbishop, pursuant to and by virtue of the said recited act, in consideration of £1408 4s. 0d., and of the yearly rent of £237

Where, under the 3d and 4th W. 4, c. 37, the immediate lessee of the Bishop purchased the fee of the lands demised, and obtained a conveyance thereof, including the royalties—*Held*, that his sub-lessee, having a *toties quoties* covenant for renewal, and contributing his proportion of the purchase money, &c., was entitled under the 6th and 7th W. 4, c. 99, as to the lands sub-let, to have a like conveyance of the fee, including the royalties.

\* This, being the first petition of the kind, is given at length.

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9s. 3d., and the covenants therein reserved, granted, bargained, sold, conveyed and confirmed unto the said Thomas Hugo, all that and those the territories, lordships and manors of Glandelough and Shangan, in the barony of Ballinacor and county of Wicklow, as the same were theretofore called or known according to the ancient mears and bounds, together with all houses, out-houses, buildings and improvements thereon, and all royalties, mines, minerals, quarries, timber and other trees, woods and underwoods, commons and commonable rights, waters and water-courses, hedges, ditches, fences, mounds, bogs, mosses, liberties, privileges, easements, profits, commodities, advantages and appurtenances whatsoever to the said lands and premises respectively belonging, or in anywise appertaining, and the reversion and remainder, and all right, title and interest, both at law and in equity, of him, the said Archbishop of Dublin, of, in and to the same; excepting and reserving to the said Archbishop, and his successors, all mines, minerals, coals and quarries then demised or leased to the Mining Company of Ireland, or other person or persons as therein mentioned; to have and to hold the said premises, with their and every of their appurtenances, unto the said Thomas Hugo, his heirs and assigns, for ever, in as full, large, ample and lawful a manner as the said Lord Archbishop had, or might, or could have power or authority to convey the same, under and by virtue of the said recited act.

That the lands of Seven Churches and Killegola, so demised to the petitioners as aforesaid, are part and parcel of the said territories, lordships and manors of Glandelough and Shangan, so conveyed by the said Archbishop to the said Thomas Hugo as aforesaid; and that pursuant to the covenant of the said lessors, in the said lease of July, 1820, for the renewal thereof, and of the provisions of the act of parliament passed in the 6th and 7th years of the reign of his late Majesty, King *William* the Fourth, entitled, an act for amending two acts passed respectively in the 3d and 4th and in the 4th and 5th years of the reign of his said late Majesty, for altering, &c., the petitioners applied to the said Thomas Hugo to make and execute to them a conveyance of a perpetual estate and interest in the said premises comprised in and demised by the said lease of 1st July, 1820, which the said Thomas Hugo having agreed to do, the petitioners, in or about the month of July last, caused a draft of a deed of conveyance of the fee simple and inheritance of said lands to be prepared and forwarded to the said Thomas Hugo for his approbation. That, afterwards, the said Thomas Hugo stated that he would not convey to the petitioners the royalties of the said lands and premises, and that he did not conceive he was bound by the several acts of parliament so to do, and accordingly refused to execute the said deed so furnished to him.

That prior to the execution of the said deed of 27th of January, 1837,

granting to the said Thomas Hugo the fee and inheritance of the said territories of Glandelough as aforesaid, neither the said Thomas Hugo nor William Hugo ever had or possessed any of the royalties of the said territories, but the same were always reserved by the Archbishop of Dublin, who, under the acts of parliament hereinbefore mentioned, was compelled to grant said royalties to the said Thomas Hugo, excepting as is aforesaid.

That the petitioners had been advised, that under the provisions of the said last-mentioned acts of parliament, they were entitled to have a grant and conveyance of the said lands so leased to them, by said deed of 1st July, 1820, together with all the royalties thereof, except those which were expressly excepted and reserved by the said deed of conveyance, to the said Thomas Hugo, upon payment of a proportionable part of the fine and expenses paid by the said Thomas Hugo, on his attaining his deed of perpetuity from the said Archbishop as aforesaid.

Prayer.—That it might be referred to one of the Masters, &c., to approve of a fit and proper deed to be executed to the petitioners, by the said Thomas Hugo, or the party or parties legally bound to execute the same, conveying to petitioners a perpetual estate or interest in said lands so demised to petitioners, with such exceptions and reservations only as were contained in said conveyance to the said Thomas Hugo. And also, that the said Master might ascertain the proportion in which the petitioners should contribute to the amount of the purchase money so paid by the said Thomas Hugo, to the Ecclesiastical Commissioners, on his obtaining his deed of perpetuity as aforesaid. And further, that the said Master might ascertain the rent to be paid by the petitioners to the said Thomas Hugo, in future. And, that upon payment of such proportion of purchase-money as should be found justly payable by the petitioners, the said Thomas Hugo might be ordered to execute to the petitioners the deed of conveyance, to be approved of by the said Master; and that the petitioners might have the costs of this petition and of the several proceedings to be had thereon, &c.

Sergeant *Greene*, for the petitioners, now moved the court, on notice, in the terms of the prayer of the petition.

The single question which the court is now called on to decide, is, whether or not the petitioners, upon payment of their proportion of the purchase-money, are entitled under 6 & 7 W. 4, c. 99, to a conveyance from the respondent of the royalties of the lands demised to them by the lease of the 1st of July, 1820? The respondent does not deny that petitioners are entitled upon payment of their proportions of the purchase-money, to the conveyance of a perpetual estate in the lands demised. The dispute is only as to the royalties, which, with the fee and inheritance were

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conveyed to the respondent by the Ecclesiastical Commissioners, pursuant to the 3 & 4 *W.* 4, c. 37. There are mines on the lands, but, in this case, they are out of the question; as they were originally reserved by the Bishop, and demised to the Mining Company of Ireland, pursuant to the provisions of the 10 *G.* 1, c. 5, and 31 *G.* 3, c. 39. That company is now entitled to the perpetual interest in the mines, which were accordingly reserved from the conveyance to the respondent, so that the royalties in dispute relate chiefly to the right of timber, tumbary, and sporting on the lands.

The conveyance contemplated by the several Church Temporalities Acts, is of "the fee-simple and inheritance." The 3 & 4 *W.* 4, c. 37, entitles the immediate lessee upon compliance with the provisions of that act, to a conveyance of the fee simple and inheritance in the lands demised; and, when the immediate lessee has obtained such conveyance, the 6 & 7 *W.* 4, c. 99, entitled the sub-lessee, upon compliance with the provisions of this act, i. e. upon payment of his proportion of the purchase-money, &c., to a conveyance of "the fee-simple and inheritance" in the lands sub-leased. There can be no doubt that "the fee-simple and inheritance" include the royalties; and this being so, and the church being required by the 3 & 4 *W.* 4, to convey "the fee-simple and inheritance" by a settled form of conveyance, the same in every case, as of course conveys the royalties to the immediate purchaser. The 6 & 7 *W.* 4, c. 99, gives to the petitioners a right precisely similar as against the respondent, to that which the respondent had under the former act, as against the church; it is therefore submitted, that he must convey to the petitioner, upon payment of their proportion of the purchase-money, the royalties of their portion of the lands.

Mr. *Hatchell*, Q. C., *contra*, submitted that the construction insisted on by the petitioners would interfere with the express contract between landlord and tenant, which could not have been intended by the legislature; and that the sub-tenant's right under the 6 & 7 of *W.* 4, is simply to have in perpetuity that which he previously possessed only for a term. Upon the other construction, the very lowest in the scale of derivative interests would alone be entitled to the fee-simple and inheritance, discharged from the conditions subject to which, and by which such derivative interest was obtained and held, and leaving the superior tenants mere rent-chargers. Mr. *Lyne*, in his work on Ecclesiastical Leases, treating upon this question, p. 141, gives it as his opinion, that as the sub-tenant's right to a conveyance or a perpetual estate, "is expressly founded on the *toties quoties* covenant for renewal, it is not to be presumed that the legislature intended to give to the under-tenant "anything but the lands, tenements, and hereditaments covered by that

"covenant; and that consequently when the mines or royalties are excepted, he cannot be entitled to call for a conveyance of them."

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Wednesday, April 24th.

THE MASTER OF THE ROLLS, having taken time to consider the matter of the foregoing petition, now said,—

The petition in this case is presented under the 3d section of the 6 & 7 of W. 4, c. 99, and raises a question upon the Church Temporalities Act. The petitioners are under-tenants of the respondent, by lease for 21 years, with a *toties quoties* covenant for renewal, of a portion of certain lands in the county of Wicklow, demised to the respondent for 21 years by the Archbishop of Dublin. Under the 3 & 4 of W. 4, c. 37, the respondent has become the purchaser of the fee and inheritance in the lands so demised to him by the Archbishop, and has accordingly obtained a conveyance from the Archbishop and the Ecclesiastical Commissioners, of the fee and inheritance in these lands. In the original lease to the respondent, the royalties were excepted and reserved, according to the right which the Bishop then had; but these royalties are now included in the conveyance to the respondent, the Bishop being required by the act of parliament to convey the fee and inheritance.

The Petitioners now call for a conveyance to them from the respondent, of the perpetual estate in the lands sub-let; and pray that the conveyance from the respondent may be with such exceptions and reservations only as are contained in the conveyance to the respondent from the Bishop and Commissioners.

It is admitted, that the petitioners, on payment of their proportion of the purchase money, and any arrear of rent and renewal fines that may be due from them, are entitled to a conveyance, from the respondent, of the perpetual estate in the lands which he sub-let to them. The parties now differ only about the royalties; and the question is, whether the conveyance from the immediate tenant to the under-tenant should include the royalties, as they were included in the conveyance from the church to the immediate tenant?

According to the literal construction of the 6 & 7 W. 4, the under-tenant should have from his landlord having purchased the fee, a conveyance as ample as the landlord had from the Bishop. But it has been said the effect of such construction would be inconvenient, and not according to the intention of the legislature; and that, according to the due construction of this act, the purchaser is bound to give to his under-tenant a perpetual estate in no more than the under-tenant already has for his term. When considering the intention of the legislature, it is necessary to



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observe what has been the course of legislation on this subject.

The 3 & 4 of W. 4, c. 37, s. 128, after reciting that "it is expedient that the tenants or lessees of the lands of Archbishops and Bishops, and other sole Ecclesiastical Corporations in Ireland, should be empowered to purchase a perpetual estate or interest in such lands and premises," enacts that "it shall and may be lawful for any such tenant or tenants, lessee or lessees \* \* \* to purchase the fee-simple and inheritance of and in the said lands;" and such tenant or lessee having done what the act requires to be done on his part, then the commissioners are required (s. 136) "to execute, seal, and deliver a deed of conveyance to such tenant, or lessee, of the fee-simple and inheritance of the said lands," &c. The conveyance thus required must, of course, include the royalties; all that the Bishop had to convey in the premises; but the right of purchasing, and of obtaining such conveyance, was by this act confined to the immediate tenant or lessee of the Bishop. However, the 149th section provided for the interest of the under-tenant, having a *toties quoties* covenant for renewal from the immediate and superior tenant acquiring the fee, "that in every such case, the conveyance of the fee-simple as aforesaid, of and in the said lands and premises as aforesaid, to such immediate and superior tenant, shall in all courts of law and equity, and to all intents and purposes whatsoever, as to such under-tenant, &c., be, and be deemed taken, and construed to be, a renewal by such Archbishop, or Bishop, or other Ecclesiastical person, or otherwise, from time to time, of the lease of such superior and immediate tenant, for the purposes of, and within the true intent and meaning of such covenant, contract or agreement for renewal aforesaid." Thus, by this act, only the immediate tenant was entitled to acquire the fee; but the *toties quoties* covenant to the under-tenant was in effect rendered a covenant for perpetual renewal of the several derivative interests dependent on it.

By the subsequent act (the 4 & 5 W. 4, c. 90), it appears the legislature deemed that the value and importance of the under-tenants' interest had not been sufficiently considered. In the 30th section, after reciting that in many cases the lands held under Bishops'-leases have been sub-let to under-tenants, with *toties quoties* covenants for renewal; and that "by reason of the small interest of the first or immediate tenants in such lands (&c), or for other reasons, they may not be desirous to purchase the fee-simple and inheritance therein," it was enacted that the under-tenant, giving notice to the intermediate tenants between him and the Bishop, should be at liberty to apply for the purchase of the fee-simple and inheritance in the same manner as prescribed for the immediate tenant; and that in case the immediate, or other superior tenant, should not apply for the purchase of the fee, within twelve

months from the date of the notice, it should be lawful for the commissioners to treat with such under-tenant, "for the absolute purchase by him, of the fee-simple and inheritance of and in the same lands" (&c.), upon the same terms, and in the same manner as prescribed for the purchase of perpetuities by any first or immediate tenant; but subject nevertheless, in addition to the Ecclesiastical rent to be reserved, "to a perpetual rent-charge, or as many perpetual rent-charges as there are tenants intervening between such Archbishop, Bishop, or other Ecclesiastical Corporation sole, and the under-tenant entering into such contract for purchase." These rents-charge to be ascertained, issuing and payable in the manner prescribed by the act; and the commissioners to convey to the under-tenant in the same manner, and under the regulations prescribed by 3 & 4 of W. 4, respecting the conveyance to the immediate tenant. "And immediately upon the execution of such conveyance, the reversions, or respective reversion then vested in such intervening tenant or tenants shall (as respects the lands purchased), *be absolutely merged and extinguished* in the freehold and inheritance thereby conveyed to such purchaser, and the said perpetual rent-charge or rents-charge, and the estate or interest therein, shall be considered as a substitute or substitutes for the rent and reversion so merged and extinguished as aforesaid."

There seems to have been, on the part of the legislature, a growing sense of the importance of the under-tenants' interest. At first, the power of acquiring the fee was exclusively confined to the immediate tenant. Then, considering in how many cases the interest of the immediate tenant consisted of a profit-rent too small to be any inducement to purchase the fee; and that the under-tenant was the person to whom, by his interest in the premises, the purchase of the fee should be most natural and desirable; it was determined, that at least in certain events, the under-tenant should be entitled to purchase and acquire the fee and inheritance, subject to a perpetual rent-charge for the immediate tenant, in lieu of his rent and reversion, which should be extinguished and merged in the fee conveyed to the purchaser. But still, the application of the immediate or superior tenant, however small his interest, was to be preferred; and if he thought proper to make the purchase, the under-tenant was concluded, however desirable for him such purchase may have been.

Then follows the 6 & 7 W. 4, c. 99, not in limitation, but in extension of the principle in favor of the under-tenants; by which, after reciting the preceding acts, and that "it is expedient to extend, explain, and amend, in certain respects, the provisions of the said acts," it is enacted (s. 1) that "it shall and may be lawful for any inferior tenant or lessee, holding any lands, tenements, or hereditaments, by virtue of any lease or contract containing a *toties quoties* covenant for renewal

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“and whose next immediate landlord has, or shall have acquired a perpetual estate and interest, &c., &c., to apply to such next immediate landlord for a conveyance of a perpetual estate and interest, &c.; which conveyance such next immediate landlord is required to make and execute to such inferior tenant, his heirs and assigns: provided, that such tenant shall previously have paid, or tendered to such landlord or his known agent, such sum or sums of money as shall be payable by such tenant, *as or for contribution to the purchase-money paid or secured by such landlord for the purchase of a perpetual estate or interest in such lands, &c.*, together with all rent, and fines and fees for renewal, and all arrears thereof,” &c. There can be no doubt as to the meaning of the terms “perpetual estate and interest” occurring in this section; as in all these acts, “perpetual estate” and “fee-simple” are used synonymously. In the third section, it is enacted that in case of dispute between the under-tenant and his next immediate landlord, or in case such landlord shall not execute to such tenant a “conveyance of the fee-simple and inheritance of and in such lands” &c., within one month after the same shall have been duly tendered, the under-tenant may apply by petition; and the 7th section gives to the next immediate landlord, having conveyed, the like remedies for the recovery of the rent reserved upon such conveyance, as any landlord or lessor has, or can have, for the recovery of rent payable under a demise by which a reversion is reserved to, or remains in such landlord or lessor.

Having then observed in what manner legislation upon this subject has progressed, I am of opinion that it was the intention of the legislature to give the privilege of acquiring the fee and inheritance not exclusively to any, but, as nearly as circumstances would permit, equally to all the tenants; probably considering that in this way the fee and inheritance were most likely, eventually, to settle with the interest to which they should most conveniently and naturally belong. By the first section of this act, the under-tenant is made a party to the original purchase; he is to pay his proportion of the purchase-money paid as the consideration for the conveyance from the commissioners to the immediate or superior tenant: I therefore think, that as to the lands sub-let, the under-tenant is entitled to have from the superior tenant a conveyance of the fee and inheritance as unqualified and absolute as the superior tenant himself received.

Order.—That it be referred to Thomas Goold, Esq., to inquire and report what is the sum which the said petitioners ought to contribute towards the sum paid by the said respondent, for the purchase of a perpetual interest in the lands and premises in the petition mentioned, held by him under the Archbishop of Dublin, on obtaining a conveyance from the said respondent of the

fee and inheritance of the land demised by the indenture of lease, bearing date the 1st day of July, 1820, in the petition also mentioned; and whether any and what sum is due for rent or renewal-fines, under said lease; and upon payment to the said respondent, by the petitioners, of such sum as the said Master shall find to be properly payable for such contribution, and the sum, if any, due for the rent and fines, it is further ordered, that the said respondent do execute to the said petitioners a conveyance of the fee and inheritance of the lands demised by said lease, bearing date the 1st day of July, 1820, subject to such rent as the said Master shall find to be the proper rent to be reserved: such conveyance to be prepared at the expense of the petitioners, and to contain only such reservations as are contained in the conveyance to the respondent, bearing date the 27th day of January, 1837, and made between the said Archbishop of Dublin of the first part, the Ecclesiastical Commissioners of Ireland of the second part, and the said respondent of the third part; and if the parties shall differ as to the form of such conveyance, it is further ordered that the same be settled by the said Master; and it is further ordered that the petitioners and the said respondent do abide their own cost of this order, and of the reference hereby directed.

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*Thursday, May 2d.*

### INJUNCTION TO STAY WASTE—LIQUIDATED DAMAGES—PENALTY.

MAXWELL and others v. MITCHELL and others.

By lease of the 12th of June, 1812, between the Rev. W. Maxwell, of the one part, and William Mitchell, of the other part, the said W. Maxwell, in consideration of the rent and covenants, granted to the said

Where the lessee covenanted not to sub-let without consent in writing,

"or that he should forfeit and pay the additional rent of £50 per annum;" and also not to cut more turf than should be sufficient for the consumption of himself, his executors, administrators and assigns, on the demised premises, without consent in writing, "or that he, &c., should forfeit and pay the additional rent of £10, for every acre which "should be so cut or made into turf;" and the representative of the lessee, upwards of twenty years ago, sub-let without consent, and the additional rent of £50 has been regularly paid and received ever since. The representatives of the lessor having lately filed their bill against the representative of the lessee, and the several under-tenants, for an account, and for an injunction in the nature of a writ of estrepement, now moved that the defendants might be restrained from selling the turf off the demised premises, and from burning the turf for manure; and from cutting or converting the reclaimed meadow land, part of the demised premises, into turf; and from cutting or making more turf than allowed by the original lease, being only a sufficiency for the use of one family:—The Court granted an injunction until the hearing, to restrain the selling of the turf, and burning for manure, and also the cutting the reclaimed meadow land; but, for the present, refused to restrain the under-tenants from cutting turf, sufficient for their own consumption on the premises;—the Court, however, observing, that there would be a serious question for the hearing of the cause.

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William Mitchell the demesne lands of Faulkland (excepting mines, trees, royalties, &c.), "as formerly in the possession of the said William Mitchell and his undertenants," situate, &c.; to hold to the said William Mitchell, his executors, administrators and assigns, from the 1st day of May then last, for the term of thirty-one years, yielding and paying, yearly, and every year, during the said term, the rent or sum of £200, sterling, payable, &c. The said William Mitchell thereby covenanting for himself, his executors, administrators and assigns, to and with the said William Maxwell, his executors, administrators and assigns, that he, the said William Mitchell, his executors, administrators and assigns, should and would, during the said demise, preserve, support, maintain and keep the said demised premises, and all improvements made and to be made thereon, in good and sufficient order, repair and condition; save and except the houses and buildings then thereon, which the said William Mitchell should not be obliged to keep in repair, the same being then in a dilapidated and ruinous condition. Also, that the said William Mitchell, his executors, administrators and assigns, should not, and would not, during the continuance of said demise, set, sell, alien or dispose of the said demised premises, without the consent, in writing, of the said William Maxwell, his executors, administrators or assigns, first had and obtained; or, should forfeit and pay to the said William Maxwell, his executors, administrators and assigns, the further additional yearly rent of £50, sterling, to be paid and recovered in the like manner as the yearly rent before reserved. Also, "that the said William Mitchell, his executors, administrators or assigns, should not, nor would not, during the continuance of the said demise, cut or make, or suffer to be cut or made, any part of the said demised premises, into turf, without the consent, in writing, of the said William Maxwell, his executors, administrators or assigns, under his or their hand first had and obtained; save and except what turf should be sufficient for the consumption of the said William Mitchell, his executors, administrators and assigns, on the said demised premises; or should forfeit and pay to the said William Maxwell, his executors, administrators and assigns, the further additional rent of £10 sterling, for every acre of the said demised premises which should be so cut or made into turf, and so in proportion for less than acre."

Mitchell was law-agent of Maxwell, and prepared the lease; and at the date of the lease, and for some years before, was in possession of the demised premises, as tenant from year to year; but had not any undertenants except one, who rented from him a small house, with the orchard and garden, part of the demised premises: all the other persons living on the lands were there only as care-takers. The demised premises contained in or about 173 acres, and were, at that time, entirely under grass, except a small portion which Mitchell had broken up; and also a bog, in which turf had been usually made for the use of the lessor's fa-

mily, when they resided there : but part of the meadow land had been bog, which was reclaimed, at considerable expense, before the making of the lease.

Mitchell entered, and, until his death, continued in possession of the demised premises under the foregoing lease. By his will he devised and bequeathed all his property, real and personal, to the defendant, the Rev. A. Mitchell, who entered into possession of the demised premises, and without consent, but regularly paying the penal rent, sub-let the premises to forty-one under-tenants, who, with their families, are resident thereon. In like manner, without consent of Maxwell or his representatives, the under-tenants all claim and exercise the right of turbary on the demised premises ; and many of them have burned the turf for manure, cut it for sale, and set the turf-banks to strangers. By these means, not only has that portion of the premises, properly to be used as bog, been, for the most part, cut away, but upwards of six acres of the reclaimed meadow land have also been cut away for turf.

Maxwell, the lessor, having died in 1818, the bill in this cause was filed by his widow and the trustees of his will, against the Rev. A. Mitchell and his several under-tenants, stating the lease and facts already mentioned ; and that, notwithstanding several cautionary notices served from time to time upon the said Mitchell and his under-tenants, the latter still continued cutting and selling the turf, and burning it for manure, insisting that they were entitled so to do. The plaintiffs submitted that cutting the reclaimed meadow land was destructive waste ; and that such excessive use, even of the turf-bank properly to be used for turf, was contrary to the true intent of the covenant in the lease, by which the lessee, or his representatives, were properly entitled to take only as much turf as would be necessary for the consumption of one family. That the plaintiffs were entitled to the increased rent of £10 per annum for every acre so cut or made into turf, without consent, by Mitchell's under-tenants ; and also to compensation for the injury thereby occasioned ; but that the plaintiffs had been unable to discover the quantity and value of the turf so consumed or otherwise disposed of in each year.

The bill prayed (plaintiffs waiving penalties incurred by the defendants) that the said A. Mitchell might be decreed to make compensation for the damage done to the reclaimed land, and to level and sow grass-seeds in such parts thereof as had been cut away, and to restore the same to the condition of meadow or pasture ground ; and that an account might be taken of all turf cut, made or sold from the premises by the said A. Mitchell, or his under-tenants ; and that the said A. Mitchell might be compelled to pay the value thereof, or such parts thereof as plaintiffs might be decreed, &c., and to make satisfaction for all waste or injury committed or permitted on the demised premises ; and that the several defendants, and their under-tenants and laborers, might be re-

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strained, by injunction, from selling any turf cut or made on the premises, or burning the same for manure, or permitting it to be removed or consumed outside the premises, and from cutting or making more than they are entitled to, according to the true intent of the said indenture of demise; and from cutting any turf whatsoever on the reclaimed land.

The defendant, the Rev. A. Mitchell, having appeared, and parliamentary appearances having been entered for all the other defendants,

Mr. *Longfield*, on behalf of the plaintiffs, moved, on the 8th of June, 1838, for an injunction, according to the prayer of the bill. The Court was then pleased to order, that an injunction should issue, to restrain the said Rev. A. Mitchell, and the several other defendants, and all persons deriving under them, from cutting, or permitting to be cut, any turf on that part of the lands of Faulkland, consisting of reclaimed bog; and from burning any part of the soil thereof for manure; and also from cutting, or permitting to be cut, any turf for sale on any part of said lands, demised, &c., by the lease of 1812, or for any other purpose, save for necessary consumption on the said demised premises: unless cause, in ten days after the service of the said order on the several defendants should be shewn, by affidavit, if the parties should wish: the defendants to be restrained in the mean time.

The defendant, the Rev. A. Mitchell, answered the bill, and stated, that, being a minor when the said W. Mitchell died, he did not come into possession of the demised premises for several years afterwards; that, in the mean time, the premises were managed by trustees, who sub-let them, and regularly paid the additional £50 per annum for so doing; and that, upon attaining his age, he only continued the same course of management which he found in operation. That he never had any counterpart or copy of the lease of 1812, but submitted that it appeared from the statement of it in the bill, that at the time of its execution, the demised premises were in the occupation of the said W. Mitchell and his under-tenants. He admitted that his under-tenants had been authorised by him to cut as much turf as would be necessary for their own consumption upon the premises; but denied that they had ever received any authority or permission from either him or his agent to commit any manner of waste; and, on the contrary, that they had been repeatedly warned by the agent not to commit waste. He admitted that at the time of making the lease, the demised premises contained 173 acres; but could not state whether or not any part of the premises consisted of reclaimed bog, nor whether the several acts of waste stated in the bill had been committed; and as to the effect of the covenant in the lease of 1812, and whether the plaintiffs were entitled to the increased rent of £10 per annum, for every acre made into turf, and to compensation for the injury, &c., he submitted that the same was

matter of law for the judgment of the court ; and that the plaintiffs had not by their bill shewn themselves entitled to relief in a court of equity ; that their remedy, if any, was at law ; and therefore he prayed, that so far as the bill sought compensation, &c., and an injunction, &c., as against this defendant, he might have the same benefit of the objection as if he had formally demurred.

Although the defendant thus raised the question upon the effect of the covenant as to the turf, in the lease of 1812, he did not give any notice of moving upon his answer, that the injunction obtained in June, 1838, might be dissolved. But as the injunction of June, 1838, only restrained the defendants from cutting the reclaimed bog, or cutting for sale, or burning the turf for manure, &c. ; and did not restrain the under-tenants from cutting turf for their own consumption on the premises,—

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Mr. *Longfield*, for the plaintiffs, now moved, that a writ of injunction in the nature of a writ of estrepement might be directed to the Rev. A. Mitchell and the several other defendants, restraining them and each of them from committing any manner of waste on the reclaimed bog, part of the premises demised, &c. ; and from burning, &c. &c., for manure ; and from cutting and carrying away turf off the premises ; *and from cutting or allowing to be cut or carried away, turf off the same, more than sufficient for the use of one family* ; and from selling or disposing of any turf of the said bog, or letting any of the turf-banks, or any part thereof.

The lease of 1812, under which the defendants derive, contains two covenants, among others, on the part of the lessee, his executors, administrators and assigns ; first, that neither he nor they should sub-let without consent in writing, or forfeit the additional rent of £50 per annum. Secondly, that neither he nor they “ should cut or make, or suffer to be cut or made, any part of the demised premises into turf, without consent in writing, &c., first had and obtained, save and except what turf should be sufficient for the consumption of the said Wm. Mitchell (the lessee), his executors, administrators and assigns ; or should forfeit and pay the additional rent of £10 sterling, for every acre of the said demised premises, which should be so cut or made into turf, and so in proportion for less than an acre.” It appears by the affidavits, that at the date of the demise there were not any under-tenants on the demised premises ; and it is plain, that the contracting parties to the lease contemplated the residence of only one family on the demised premises, and that the quantity of turf allowed by the lease was only so much as should be required for the consumption of one family. However, the defendant, the Rev. A. Mitchell, and those acting on his behalf, have thought proper to sub-let the lands, and pay



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the additional rent of £50 a year; and this demesne has been, and now is, sub-divided into a set of cottier holdings, having no fewer than forty-one resident families. All of these, not only claim turbary for their own consumption, but set the turf-banks, and sell the turf to strangers off the estate, and are wasting the reclaimed land by converting it into turf. The plaintiff's right to an injunction, to restrain the sale of turf to strangers, and the waste of the reclaimed land, cannot be disputed. The only question is, whether there being a forfeit rent, the court will grant an injunction to restrain the under-tenants from using as much of the proper turbary of the estate as may be necessary for their own consumption on the premises.

The additional rent in this case must be considered in the nature of a penalty, and not of liquidated damages: the language of the covenant is, "he shall *forfeit* and pay." It should be borne in mind that the demised premises consisted of the demesne and mansion-house, the ancient residence of the lessor and his family; that the lease was made to William Mitchell, the agent of the lessor; and that the sub-letting, and extravagant use of the turf, did not commence until after the death of William Mitchell. It cannot successfully be contended, that the reservation of the additional rent was intended by the lessor as a conditional agreement that the lessee or his representatives should be at liberty to sub-let and use the turf as he and they might please. Unless the court shall be of opinion that such was the intention of the lessor, the additional rent cannot be regarded as liquidated or stipulated damages, but merely as a penalty by way of an additional security against the doing of that which the lessor intended should not be done, and the lessee covenanted for himself, his executors administrators and assigns not to do (a). The payment and receipt of the penalty may perhaps avoid an action upon the covenant, but does not license the sub-letting. *Astley v. Weldon* (b). In *Barrett v. Blagrove* (c), though a penalty of £50 per month, and forfeiture of the lease, were imposed on breach of the agreement, the court granted an injunction; and in *Hardy v. Martin* (d), Lord Loughborough said, a penalty is never considered in this court as the price of doing what a man has undertaken not to do. In *Howard v. Hopkyns* (e), Lord Hardwicke used similar language, and made a like decision.

No doubt, decisions may be cited, seemingly at variance with these just mentioned; and it cannot be denied that the rule upon the subject does not appear to be very clearly settled. However, the general principle seems to be, that when it may be collected from the terms of the covenant or agreement, and the circumstances of the case, that the inten-

(a) See 1 Fonbl. 183, where most of the leading cases on this subject are collected.

(b) 2 Bos. & Pul. 346.

(c) 5 Ves. 555; 6 Ves. 104.

(d) 1 Cox, 26.

(e) 2 Atk. 371.

tion of the parties was, that the penal rent or sum specified should be in the nature of liquidated damages; there, equity will not restrain the act, but leave the party to enforce the terms at law. On the other hand, where, as in the present case, it appears that the penal rent or sum specified was intended not as the price for the permission of the act, but simply as a security against it, such penal rent or sum is not to be considered as liquidated damages, nor as any ground for refusing the injunction to restrain the act: *Prebble v. Boghurst* (a); *Davies v. Penton* (b); *Hunt v. Brown* (c); *Croly v. Mathew* (d).

The acts done by the defendants in this case are clearly waste, of the most vexatious and injurious kind: here is a gentleman's demesne sub-let in a set of very small holdings, and upwards of forty wretched cabins planted on it. Lord Coke lays it down that the building of an additional house without consent is waste (e); and although in *Lord Davy v. Ashwith* (f) it is said, that a lessee may build a new house where none was before, yet it must be in every way at his own charge; and in *Luttrell's case* (g), it was decided, that if a man has *estovers* by grant or appendant to an ancient house, he shall not have them to a house which he new builds. It is therefore submitted that an injunction should issue to restrain Mitchell and his undertenants, from using more turf than allowed by the lease of 1812, *i. e.* more than sufficient for the use of one family.

Mr. Cooke, for the defendant the Rev. A. Mitchell, *contra*.—This is a case of liquidated damages, in which the court will not grant an injunction, but leave the plaintiffs to proceed at law. The two covenants under consideration in this case, are in the same form; they are both in the alternative. The lessee or his representatives were at liberty to take whichever branch of the alternative they pleased: either not to sub-let without consent in writing; or, to sub-let without consent, and pay for so doing, the additional rent of £50 per annum: and again, either not to cut, or make any part of the demised premises into turf without consent in writing, except what should be sufficient for the consumption of the lessee, his executors, administrators and assigns, on the demised premises; or cut as much turf as the lessee and his undertenants might require, and pay for so doing the additional rent of £10 for every acre so cut or made into turf. It is plain, that the lessor and lessee contemplated the possibility of the lands being sub-let, and of a

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(a) 1 Swanst. 318.

(c) 5 Law Rec. N. S. p. 130.

(e) 1 Inst. 53.

(b) 6 Bar. & Cress. 216.

(d) Craw. & Dix. 87.

(f) Hob. 234.

(g) 2 Coke. Rep. 86. (a).

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greater quantity of turf being made than would be sufficient for the lessee and his assigns. They have accordingly settled the additional rents to which, in such events, the lessee or his assigns should be liable. It is true, the statement of the alternative in both covenants is, "or, he *shall forfeit and pay*;" but it is not said, that the lease is to be forfeited; nor is there anything whatsoever to shew, that the parties intended more or less than that in certain events, the lessee should be liable to the additional rents. The plaintiffs have, for the last twenty years and upwards, been themselves treating the additional rent as liquidated damages, at least as to the first covenant. There never has been any application to restrain the defendant from sub-letting; and for upwards of twenty years, the lessor and his representatives have been annually receiving, as of course, the additional rent stipulated, the lands being sub-let without consent. It is therefore submitted, that the plaintiffs are concluded by their own acts, from saying that the additional rents are not liquidated damages.

The cases cited on the other side, were cases not of liquidated damages, but of penalties, and therefore do not apply here. The present case, it is submitted, cannot be distinguished from *Woodward v. Gyles*(a); *Rolfe v. Peterson*(b); *Jones v. Green*(c); *Moloney v. Quail*(d); and therefore the plaintiffs should be left to proceed at law as they may be advised.

With respect to the statement that the demised premises were the mansion-house and demesne, where the lessor and his family had usually resided, it may be proper to observe, that the lease describes the mansion-house as ruinous; and that the premises are further described by the lease as being *then in the possession of the said William Mitchell and his under-tenants*.

*Monday, May 6th.*

THE MASTER OF THE ROLLS, after reading the notice of motion, and stating the contents and prayer of the bill in this case, said,—

In June, 1838, the principal defendant the Rev. A. Mitchell having appeared, and parliamentary appearances having been entered for the other defendants, the plaintiffs made an application, of which the present is only the renewal. That application was in part granted,—so far as it sought to restrain the sale of the turf, and the burning of it for manure, and the cutting of the reclaimed meadow land for turf; but was refused as to that part which sought to restrain the under-tenants from cutting as much turf as they should require for their own consumption on the demised premises. The Rev. A. Mitchell has since answered the bill;

(a) 2 Vern. 119.

(c) 3 Y. & Jer. 292.

(b) 2 Bro. P. C. 436.

(d) 4 Law Rec. N. S. 107.

and though by his answer he has raised the question as to this being a case of liquidated damages, in which this court should not interfere, yet he has not served any notice of applying for the discharge of the injunction already obtained; nor have any of the under-tenants shewn cause against it.

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The question raised by this case, is one which does not appear to have been very satisfactorily settled. The question is, when a man covenants or agrees with another to do or not to do a particular thing; and that in the event of the thing being done, or not done, contrary to the covenant, the covenantor shall forfeit and pay a certain additional rent, or specified sum,—whether such additional rent or sum specified, is to be considered merely as a penalty by way of additional security and further means of enforcing the prohibition; or, in the nature of liquidated damages for breach of the covenant,—in other words, as the stipulated price at which the covenantor shall be discharged from the restraint, and at liberty to act in the premises as he wills? In *Woodward v. Gyles (a)*, which was a case very similar to the present, the court decided, that the additional rent was in the nature of liquidated damages; and, therefore, refused an injunction, and left the parties to proceed at law. But the question was not argued in that case; and the principle of the decision (which was so long ago as the year 1690) seems to have been afterwards admitted or passed over without discussion. I do not at all mean to say, that the decision in that case was not the right one, nor that it should not now be followed; but I think that, as it appears to have been pronounced without argument, or the valuable aid of a previous discussion by counsel, it cannot be regarded as a conclusive or satisfactory authority upon a difficult question.

In *Rolfe v. Peterson (b)*, the reason of the ultimate decision does not distinctly appear. There, the landlord proceeded at law upon the covenant; the tenant suffered judgment by default; and upon a writ of inquiry, several witnesses having been examined as to the damage, the jury assessed the damages to the amount of the penal rent. The tenant then, after several dilatory and vexatious proceedings, filed a bill in Chancery for an injunction to restrain the landlord from issuing execution at law; alleging that the verdict was for excessive damages, and undertaking to pay the reasonable amount of damage when ascertained. A main question in that case was, whether upon an action of covenant brought by a landlord upon a lease, and damages therein assessed by a jury, there being no allegation of mistake or fraud, a court of Equity has jurisdiction, or ought to direct issues for reassessing those damages? It was insisted that the court should not direct such an issue; as the *quantum* of damages is not the proper subject matter of equita-

(a) 2 Vern. 119.

(b) 2 Bro. Par. Cas. 436.

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ble jurisdiction. But the Chancellor, Lord Camden, held that the tenant was entitled to be relieved against the verdict which appeared excessive; and directed the parties to proceed to a trial at law, at the next assizes, upon the issue of *quantum damnificatus*. The decision in *Woodward v. Gyles* does not appear to have been referred to in this case, which was in 1770—1772; but it is plain, that Lord Camden did not consider the additional rent to be in the nature of liquidated damages, as to which the parties were concluded; and although upon appeal his decree was reversed and the injunction bill dismissed, the reason of the reversal is not stated, and may have been totally independent of the question at present under consideration. But even if this case should be considered as establishing the proposition, that equity should not restrain the landlord from proceeding upon the covenant at law, to recover the penal rent; it does not necessarily follow, that because there is a penal rent, a tenant for years, drawing near the expiration of his term, should not be restrained from doing in excess, that which he had undertaken not to do.

In *Jones v. Green (a)*, although it is said, that the additional rent reserved upon the breach of covenant, is to be considered in the nature of liquidated damages, and not of penalty, the point of decision is only this, that to a bill filed by the landlord for discovery of breaches of the covenant in aid of an action at law, the tenant must answer, and cannot plead that the discovery might subject him to penalties.

On the other hand, in the case of *Barrett v. Blagrove (b)*, where the breach of covenant was subject to an additional rent of £50 per month, and forfeiture of the lease, the court granted an injunction to restrain the tenant. That decision, if to be followed, would be an express authority for an injunction in the present case; and at least, shews that the general question is not to be considered as having been settled by the rule in *Woodward v. Giles*, or *Rolfe v. Peterson*. In the case of *Moloney v. Quail (c)*, where there was a covenant against ploughing more than ten acres, under penalty of £12 for each and every acre additional; and the landlord having moved for an injunction, on the common injunction bill, the late Master of the Rolls, after stating what was the inclination of his own opinion, and after referring to several authorities, concluded by saying, "that the case was not free from doubt; and "in a doubtful case, a perpetual injunction ought not to be granted;" he therefore refused the application.

It is plain, that to apply *Luttrell's case*, and the other authorities of that class, to the case now before the court, would be to assume that the landlord was not a consenting party, which is the very thing in dis-

(a) 3 Young & Jer. 298.

(b) 5 Ves. 535, & 6 Ves. 104.

(c) 4 Law. Rec. N. S. 107.

pute, and which is certainly not rendered more likely, by considering what has been the conduct of the parties for several years, in relation to the covenant against sub-letting and the additional rent thereby imposed. However, I think the parties are not now to be concluded by that consideration; and that there will be a very serious question for the hearing of the cause.

Under all the circumstances, and considering the unsettled state of the authorities, I will not, as against the Rev. A. Mitchell, enlarge the injunction already granted, but I will continue it until the hearing.

**Order.**—Make absolute, as against the defendant the Rev. A. Mitchell, the order bearing date the 12th June 1838; and accordingly restrain him as in that order, until the hearing of this cause or further order. And let this order be without prejudice to that part of the former order which restrains the other defendants from doing the acts therein mentioned, until they shall shew cause against said conditional order: the said defendants not having as yet answered the bill in this cause, or shewn cause on affidavit against such order. Refuse so much of the plaintiff's motion as seeks an injunction against cutting more turf on the lands in the pleadings mentioned, than is sufficient for the use of one family.

—◆—  
*Wednesday, May 22d.*

**PRACTICE—EXAMINATION OF DEFENDANT BY A  
THIRD PERSON PROVING A CHARGE IN THE  
MASTER'S OFFICE.**

**CRAMER v. GRIFFITH and others.**

T. Gorman, a third person, by leave of the court, filed a charge under the decree in this cause, and the receiver filed a discharge thereto. The Master having certified for a commission in aid, Gorman examined several witnesses to prove his charge; and it became necessary on the part of the receiver to examine the defendant Griffith in support of the discharge; but the examiner objected that there was no rule to examine Griffith.

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MITCHELL.

The side-bar rule for the examination of a defendant, applies only between co-defendants: therefore, a third person proving a charge or discharge in the Master's office

and desiring to examine a defendant in the cause, must apply for liberty so to do, by motion of course.

*May, 1839.*

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v.  
GRIFFITH.

*Mr. Jenkins*, for the receiver, now moved, as of course, for leave to examine Griffith, subject to all just exceptions.—[MASTER OF THE ROLLS. Is there not a side-bar rule for this?—No; the side-bar rule only applies as between co defendants.

Motion granted.\*

\* NOTE.—The application, when be on notice.—See *Blake v. Blake* on the part of the plaintiff, must and others, *ante*, 198.

*Monday, June 3d.*

#### SURETY OF TENANT UNDER THE COURT—LIABILITY OF.

*MEEHAN and Wife v. CUSACK, (and two other causes).*

Where the lease under the Court having expired, the tenant removed his property from the premises owing upwards of a year's rent, and the receiver had obtained a conditional order for liberty to put the recognizance of the sureties in suit, it further appeared that by previous arrangement, W. D. one of the sureties was the real tenant who enjoyed the premises to his sole use and always paid the rent, the nominal tenant having merely lent his name and being insolvent; and that M. M. the other surety, had consented to join in the recognizance, in consequence of a promise of indemnity from W. D.—The Court refused to stay proceedings against M. M. until it should appear that a proceeding against W. D. would be fruitless.

On the 9th of May last, the receiver in these causes obtained an order, unless cause in ten days, to put in suit the recognizance of William Dickenson and Mark Monseratt, the sureties of William Monseratt, lately tenant under the court, of the house and 36 acres of the lands of Grange in the pleadings mentioned.

The receiver's affidavit stated, that the lease for seven years pending these causes, expired on the first of January last; that immediately afterwards, all the tenant's property was removed from the premises; that William Dickenson, who appeared as a security, was the real tenant; that William Monseratt, the nominal tenant, was in insolvent circumstances, and confined in the sheriffs' prison for debt; that the rent reserved by the lease was £260 per annum; that £275, being one year's rent and taxes, remained due and unpaid; and that after several fruitless applications, the usual monthly notice was duly served on both William Monseratt, and William Dickenson, on the 15th of January last.

*Mr. Bessonnet*, Q.C., with whom was *Mr. Christian*, on behalf of Mark Monseratt, now came in to shew cause against the conditional order.

*Mr. M. Monseratt's* affidavit, after admitting the several facts set forth in the affidavit of the receiver, stated, that at the time when the lands were let under the court in these causes, a close intimacy existed between him and William Dickenson, the nominal co-surety. {That Dickenson applied to deponent, stating his having taken the said house and land of Grange, under the court; and that it was agreed between the said Dickenson and William Monseratt, that the said William Mon-

seratt should be the nominal tenant, and the said Dickenson and this deponent, the sureties; and that if this deponent would agree to be such surety, the said Dickenson would save this deponent harmless from all liability.—That deponent, upon the faith of Dickenson's promise, consented to be named as surety and joined with the said Dickenson in the recognizance; but that the receiver had been fully aware from the commencement of the tenancy, that Dickenson was the real tenant; and that William Monseratt had merely lent his name, but never interfered with the premises, nor derived any advantage under the lease. The affidavit further stated, that the monthly notice had not been served on this deponent; and proceeded to shew want of due diligence on the part of the receiver, and averred, that Dickenson had sufficient property, out of which the amount due might be enforced.

The counsel said, that although the facts stated in the foregoing affidavit might not, in strictness, amount to good cause against the conditional order; yet the court, looking at the equities between Dickenson and Mr. M. Monseratt, would say that the amount due should be enforced, if possible, from Dickenson; and that until proceedings against him should prove fruitless or insufficiently productive, Mr. M. Monseratt ought not to be called upon.

Mr. *Hayes*, for the receiver, submitted, that no cause whatever had been shewn against making the conditional order absolute. The case, which it had been attempted to make, of want of due diligence on the part of the receiver, had not been made out: in fact the receiver had acted with the utmost diligence; but even if it were otherwise, the very late decision in the case of *Richardson v. Walsh* (a), was an express authority to shew, that the want of due diligence on the part of the receiver does not avoid the liability of the sureties. The receiver admits, that Dickenson was in fact the tenant; but the receiver was no party to the alleged arrangement between M. Monseratt and Dickenson. W. Monseratt, the person in whose name the lease was taken out, is insolvent; the facts now before the court, plainly shew that the solvency of Dickenson is questionable, and that any proceedings against him might be fruitless. Of M. Monseratt's ability to pay the amount due, there is no question; and the receiver therefore submits, that he is the proper and substantial object to proceed against in the first instance; and that such proceeding should not be stayed. The lands will be sold under the decree on the 6th instant, and the receiver is therefore anxious to have all the matters of his receivership wound up as soon as possible.

MASTER OF THE ROLLS.—It is admitted that no sufficient cause has

(a) Ante, 147.

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v.  
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*June, 1829.*  
 MEEHAN  
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 CUSACK.

been shewn why the conditional order in this case should not be made absolute. But I am asked to stay proceedings against Mr. Monseratt until it shall appear that the amount due cannot be recovered from Mr. Dickenson; because, it is said, by arrangement, the person in whose name the lease was taken out, and who it appears is insolvent, merely lent his name, but never interfered; and Mr. Dickenson, who was represented to the court as one of the sureties, was in fact the tenant, who had all the advantage of the lease; and Mr. M. Monseratt was induced by Dickenson to join in the recognizance, upon the distinct assurance that Dickenson would indemnify him.

I abide by the rule laid down by me in *Richardson v. Walsh*, and think that when the rent in arrear cannot be enforced from the lessee, the receiver should not be restrained from proceeding against the sureties or either of them. In the present case, I see no reason for departing from that rule, nor why proceedings against Mr. Monseratt should be stayed. The agreement between Messrs. Dickenson and Monseratt, with which the court has at present nothing to do, should, if considered, rather afford a special reason for the strict application of the rule: for that agreement was entered into in furtherance of a deceit which has been practised upon the court; and when a party to such an agreement comes forward to ask a favor from the court, resting his application upon the merits of the agreement, he should be at least prepared to hear his application peremptorily refused.

Disallow the cause shewn, with costs.

*Thursday, June 6th.*

#### PRACTICE—PETITION—NOTICE OF MOTION.

SCOTT, Petitioner: DENROCHE, Respondent.

Where a petition matter being called on, there was no attendance on the part of the petitioner, and the notice of the application was therefore struck out of the list:—*Held*, that the matter

The petition in this matter being called on, on the last petition day, was struck out of the list, the solicitor for the petitioner not being in attendance. A new notice of motion on it was then served for this day; but his HONOR would not suffer it to be moved, and said, that as it was not moved on the last petition day, it was as of course dismissed; and therefore that the matter could not afterwards be moved without a new petition.

could not afterwards be moved without a new petition.

*Friday, June 7th.*

**PRACTICE—SERVING COPY OF REPLICATION—NOTICE.**

**CREMIN v. HOWROYD and others.**

Mr. KELLER, for the defendants, Howroyd and another, moved that the plaintiff's bill might be dismissed for want of prosecution, pursuant to the 93d general order. Since the notice of this motion the plaintiff filed his replication, and his solicitor served on the solicitor for the defendants a copy of the replication, as cause against the motion.

The defendants' counsel submitted that they were entitled to dismiss the bill, in as much as the service of the replication by the plaintiff's solicitor was not "due service thereof" under the 93d general order. By the 4th general order of November, 1834, "due service" was defined to mean "service on a six-clerk only;" and prior to the 6th and 7th of W. 4, c. 74, abolishing the office of six-clerk, and the general orders of October, 1836, "due service" in the 93d general order must have meant service on a six clerk and by a six-clerk; especially as the language of that rule was different in reference to the undertaking to hear the cause, which was thereby only required to be *lodged* with the defendants' six-clerk. By the 97th general order (November, 1834), a compared copy of the replication must be "duly served" on each of the defendants who has answered; and it is declared that "until such replication be *duly served*, issue shall not be deemed joined; but each defendant shall be "at liberty to proceed as if such replication had not been filed." The 4th general order of October, 1836 (the office of six-clerk being then abolished), directs "that all notices, summonses, orders, and other matters", which had theretofore been served by or on the six-clerks, should thereafter be served through the notice office: therefore due service of the replication under the 93d rule, must be service through the notice office, and any other must be deemed a nullity. The counsel further submitted that all documents should be served through the notice office: that in this way only could disputes as to the fact of service be avoided, and that there would otherwise be no means of proving the service at a future time; there being no affidavit, nor any record of it, except in that office.

The copy of the replication should be served on the defendants, through the notice office; otherwise, the service will be insufficient.—All such notices and documents as should formerly have been served through the Six-clerks, must now be served through the Notice-office.

MASTER OF THE ROLLS.—I have looked through the orders referred to, and am of opinion that there has not been in this case any sufficient service of the copy of the replication. "Due service" under the orders, must, I think, be considered to mean service through the notice office, exclusively; although that may, perhaps, impose upon the officer the performance of a duty for which the schedule of fees does not provide any remuneration. However as the present objection is now made for

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the first time, and as the service of the replication in this case appears to have been according to the general practice among solicitors hitherto, I will not, on the present occasion, visit the plaintiff with such a penalty as the dismissal of his bill. But I must now desire all the practitioners in this court to take notice that copies of replications, and all such notices and documents as formerly were served through the six-clerk's office, must be served for the future through the notice office, as required by the general orders; and that otherwise the service shall be deemed insufficient.

No rule on this motion; but the defendants to have their costs up to the time of receiving the copy of the replication.

*Saturday, June 8th.*

NEW TRUSTEES—1. W. 4, c. 60, s. 22.

WILLIAM WALLACE LEGG, Petitioner.

The Court made the usual order of reference to the Master, to approve of fit and proper persons to be new trustees, of the will, &c. under 1 W. 4, c. 60, s. 22,—the devise to the trustees being to them and the survivors of them, and the heirs and assigns of such survivor, and it appearing that the trustees named were both dead; that they had never acted, but had never declined, nor ever were called upon to act; and that the heir-at-law of the survivor was resident in Canada.

Mr. WHITESIDE, on behalf of the petitioner, moved that a new trustee or trustees might be appointed under the 1st W. 4, c. 60, s. 22, in the room of William M'Cance and John Stewart, deceased, trustees named in the will of William Legg, dated 2d November, 1804; or, if necessary, in the room of Thomas Alexander Stewart, the heir-at-law of the said John Stewart, the surviving trustee named in the said will; and for a reference to the Master to appoint a fit and proper person or persons, &c.; and that petitioner might be at liberty to proceed on the appointment, pursuant to the Master's report, without further order.

The affidavit of Mr. Legg, verifying his petition, stated that William Legg, the testator, by his will, duly executed, and bearing date the 2d of November, 1804, devised and bequeathed all his estates real and personal, to M'Cance and Stewart, both since deceased, their heirs and assigns, and to the survivor of them, upon trust to pay his debts and legacies thereby given; and all the residue and remainder of his estates to the use of deponent for life; with remainder to the trustees and the survivor of them, and the heirs and assigns of such survivor, to preserve contingent remainders; remainder to the first and other sons of deponent in tail male; with divers remainders over, and with power to the trustees, their heirs and assigns, and the survivor of them, to charge the said estates with any sum not exceeding £8000, for the younger children of deponent, and with any sum not exceeding £300 yearly, as a jointure for the wife of deponent: and testator appointed his said trustees, and two other persons, as the executors of his said will.

The testator died, without revoking or altering the aforesaid will, on the 20th September, 1821. The executors did not act, and administration, with the will annexed, was granted to deponent, on the 29th November, 1821. The trustees never acted, but never declined, nor ever were called upon, to act.\* They were now both dead; Stewart was the survivor, and his heir-at-law, Thomas A. Stewart, was resident out of the jurisdiction, in Upper Canada.

By marriage settlement, executed on the marriage of petitioner, in September, 1838, petitioner charged, so far as he could, the said estates, under the powers mentioned in the will, with £300 per annum jointure for his wife, and £8000 for the younger children (if any) of the marriage; and covenanted either to procure the confirmation of the charge by the heir-at-law of the surviving trustee named in the will, or to apply to this court for the appointment of new trustee or trustees under the 1 W. 4, c. 60, for the purpose of joining in a deed which should effectually charge the said estates with the said jointure and provision for younger children.

MASTER OF THE ROLLS.—Take the usual order.

\* See *Mitchell*, Petitioner, and *Nixon* and another, Respondents, *ante* 155.

Thursday, June 13th.

PRACTICE—PLAINTIFF OUT OF THE JURISDICTION—  
SECURITY FOR COSTS.

KNIGHT and WIFE v. Lord DE BLAQUIER, STEVENSON and others.

The defendants having, on the 11th April last, obtained an order that all further proceedings in this cause should be stayed, until the plaintiffs, who resided out of the jurisdiction of the court, should give security for costs,

Mr. *Robert Tighe*, for the plaintiffs, now moved that the Master might be at liberty to receive the Earl of Orkney as a sufficient security for costs, upon his entering into security by recognizance.—The affidavits stated that Lord Orkney resided out of the jurisdiction, but was possessed of £4000 per annum, unincumbered fee-simple property in Ireland. Counsel submitted that, although according to the practice of the

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Proceedings being stayed until the plaintiffs, who were resident out of the jurisdiction, should give security for costs,—an application that the Master should be at liberty to receive the Earl of O., who was also resident out of the jurisdiction, but possessed of a

clear fee-simple estate of £4000 in this country, as security for costs, refused with costs. *Semble*, that the Earl of O., with a second surety resident within the jurisdiction, and for a comparatively small amount, would probably be sufficient.

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DIGBY  
v.  
BROWNE.

**MASTER OF THE ROLLS.**—The advance of £75, upon £1650, certainly is small; but it is only reasonable that as much should be got for the estate as possible; I therefore think that the biddings should be opened upon the terms proposed. Probably some of the sporting gentlemen may be disposed to make a still further advance upon the resale. Mr. Stokes cannot have the costs prematurely incurred by him in investigating the title: I have so decided in the case referred to.

Motion granted.

*Thursday, July 4th.*

### RECEIVER—DISCHARGE OF, PENDING A REFERENCE

HUTCHINS v. HOTCHINS.

The Court will not retain a reference as to arrears of rent, after the discharge of the receiver. But where, in consequence of a dispute between the tenants and receiver, the tenants obtained an order of reference to the Master, to inquire and report the amount of rent due, and pending the reference the plaintiffs and defendants by consent obtained the discharge of the receiver, whereby the reference was determined, the Court ordered the plaintiffs and defendants to pay the costs of the order of reference, and of all proceedings had thereunder.

In this case, Samuel Hutchins, having been appointed receiver over the lands and premises in the pleadings mentioned, served the usual notice upon Cornelius Daly, Charles Daly, Honor M'Carthy, and other tenants of the said lands, calling upon them by a certain day to pay him large sums, which he alleged to be due by them for arrears of rent, and threatening, in the event of non-compliance, to distrain the lands. The tenants served a notice in reply, stating, that they did not owe the arrears of rent alleged to be due by them, if all fair credits were given; and that the receiver had charged them with a higher rent than they were bound to pay. At the same time, they offered to produce their vouchers and to go into an account of their rents. To this the receiver objected, and distrained some of the tenants, particularly Honora M'Carthy, whose property was alleged to have been seized by the receiver to a large amount, and sold under the distress at great undervalue, and some of it to have been bought in by the receiver and his bailiffs for their own use. The tenants having applied to this court, some of them in the month of February 1838, and others in the month of June 1838, orders of reference were made to the Master, on their behalf to inquire and report the rents due by them respectively,—they undertaking to pay up one year's rent, and to take the reference at their own expense. And, with respect to Honora M'Carthy, an account was directed of the value of the goods sold under the distress, and the profit made of them by the receiver or his bailiffs.

Under this reference some proceedings were had before the Master, and the tenants, Cornelius and Charles Daly, having filed a charge in the office, all their vouchers were examined and admitted by the Master, and a summons to shew cause why a summons should not issue to settle the draft report, was taken out by them. The reference

however was adjourned, at the instance of the receiver's solicitor, until the month of November, 1838. Shortly before the time appointed for resuming the reference, the defendant Arthur Hutchins died; but the suit having been revived, the tenants issued another summons for some time in the month of February 1839. In the mean time, the plaintiff and defendant entered into a consent to discharge the receiver, for the purpose, as they alleged, of taking away the jurisdiction of the court to grant other references on the part of other tenants on the property; but the tenants alleged, that the receiver was discharged to take away the jurisdiction of the court as to the references then pending, as they were likely to terminate in their favor.

The Master having refused to proceed with the references, in consequence of the discharge of the receiver, an application was now made on the part of the tenants, that the Master should be at liberty to proceed with the references, notwithstanding the discharge of the receiver; or that the tenants should be paid the costs of the obtaining of the several orders of reference, and of the subsequent proceedings thereunder. It appeared that the administrator of the deceased defendant had brought actions at law against the several tenants, for the arrears alleged to be due by them, and that the tenants had served a consent on the parties in the cause, that the references should be continued, notwithstanding the discharge of the receiver, and that the actions should in the mean time be stayed.

*Mr. Keatinge, Q.C., and Mr. B. C. Lloyd, for the tenants.*—The receiver has been discharged with a view to put an end to this account, the parties in the cause well knowing that it would terminate favorably to the tenants. On the part of the Dalys the report was substantially obtained; the Master having admitted all their vouchers. The court will not permit its orders to be trifled with in this manner, and although it might refuse to make similar orders of reference on the part of other tenants, since the discharge of the receiver, yet, that is not to prevent the court from giving effect to its own orders already made. At all events, if the court should be of opinion that it has no jurisdiction to retain the references, the tenants are entitled to full costs of all the proceedings, and of obtaining the original orders, together with the costs of the present motions.

*Mr. Collins, contra.*—The court has no jurisdiction to retain these references, in consequence of the discharge of the receiver. The parties in the cause are not to be blamed for desiring to take the management of their own estate into their own hands, instead of leaving it to be managed by this court. As to the costs, the tenants are not entitled to them, the orders having fallen to the ground: besides the tenants have not obtained their reports within the time limited by the orders.

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v.  
HUTCHINS.

THE MASTER OF THE ROLLS.—I am of opinion, that I have no jurisdiction, in consequence of the discharge of the receiver, to retain the references; but as the parties in the cause have chosen to deprive this court of its jurisdiction as to the references, I think that the tenants are entitled to full costs of obtaining the original orders of reference, and of all the subsequent proceedings thereunder, including the costs of this motion.

Order.—Let the plaintiff and defendant, the personal representative of the late defendant A. Hutchins, pay to the said several tenants the costs of the orders of reference, and of all proceedings thereunder, and of this motion.

Friday, July 5th.

### INJUNCTION TO STAY WASTE—TENANTS' INTEREST DETERMINED.

WRIXON v. CONDRAN and others.

Where the relation of landlord and tenant existed between the parties, the court has sometimes interfered by injunction to restrain waste, though the *locus in quo*, being the property of the landlord, was not any part of the demised premises: but where such relation does not exist, the court will not interfere. Therefore where waste on the demised premises was commenced during tenancy and continued after the tenancy had been determined, by persons claiming under the late tenant, the court, after the determination of the tenancy, refused to grant an injunction.

Mr. B. C. LLOYD moved for an injunction to restrain the defendants from committing waste.

The bill in this case was filed to restrain the defendants from committing waste, by digging turf upon the bog called the Red-Bog. The affidavit made to verify the bill, stated, that the plaintiff's father held the bog, with other premises, under a lease for one life and twenty-one years afterwards, and that while the plaintiff's father was in possession of the premises he demised a portion of the bog to Daniel M'Auliffe and Timothy Lyons, as tenants from year to year; that Daniel M'Auliffe and Timothy Lyons, during the continuance of the demises, contracted with the defendants to allow them the privilege of cutting turf upon the portion of the bog demised to them, and that the defendants, by virtue of such agreements, exercised the privilege of cutting turf upon the portions of the bog in the possession of the said Daniel M'Auliffe and Timothy Lyons. That the plaintiff, upon the decease of his father, became entitled to his interest in the premises, and being desirous to regain the possession of the bog, he caused notices to quit to be served upon the said Daniel M'Auliffe and Timothy Lyons, and subsequently, at the sessions for that district, obtained decrees in the Barrister's court in the month of September last, to be put into the possession of the portions of the bog so demised to the said Daniel M'Auliffe and Timothy Lyons. That notwithstanding the determination of the interests of the said Daniel M'Auliffe

and Timothy Lyons, the defendants claimed the right of cutting turf upon the said bog, and had recently entered upon the bog and cut a large quantity of turf, which they threatened to remove and use for their own purposes and benefit, and they had already committed much waste, and done great injury to the said bog. That the plaintiff had caused the defendants to be summoned before the Magistrates of the district; but that they had declined to interfere, in as much as the defendants had claimed under a color of right to cut turf upon the bog; they therefore recommended the plaintiff to file a bill for an injunction to restrain the defendants from cutting turf or committing waste upon the bog.

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MASTER OF THE ROLLS.—I am sorry the Magistrates came to that conclusion. This is clear case of trespass, in which this court cannot interfere.

Mr. *B. C. Lloyd*, in continuation.—There certainly is the objection which the court has made to the application for the injunction sought in this case, but here the defendants were not originally trespassers: their right commenced during the subsistence of the interests of Daniel M'Auliffe and Timothy Lyons, who were at one time tenants upon the lands. The affidavit states that the bog is essential to the enjoyment of the plaintiff's other property in the neighbourhood, and that great waste has already been committed upon it.

MASTER OF THE ROLLS.—The interest of the former tenants, Daniel M'Auliffe and Timothy Lyons, has been determined by a decree in the Barrister's court; and, of course, all derivative interests were extinguished at the same time: this, therefore, is a case of mere trespass. I have sometimes interfered by injunction, where it appeared that the defendants, being tenants to the plaintiff, entered and were committing waste upon a neighbouring bog, belonging to the plaintiff, and on which they had no right to enter, or cut turf; but here there is no privity between the parties; the defendants are mere trespassers, and, in such a case, I have no jurisdiction to interfere.

No rule.



## EQUITY EXCHEQUER.

*Saturday, April 20th.*

## PRACTICE—EXHIBIT—INFANT.

WHITE v. BAKER.

Where a minor is a party, the court will not permit a witness to be examined *visa voce* at the hearing of a cause, to prove a deed or exhibit, which must be proved in the office by an examination of the witness upon interrogatories.

In this case an order had been obtained on the part of a defendant, for liberty to prove his mortgage on the hearing, as an exhibit, but there being a minor, a party defendant in the cause, the COURT refused to permit the deed to be so proved; they, however, gave the defendant liberty to prove the deed in the Remembrancer's office, by interrogatories, and directed that, on the same being so proved, an account should be taken on foot of it, and also of prior incumbrances.\*

\* So, in the Court of Exchequer, in England, where an infant is a party, and his interest is concerned, the court does not allow of an order to examine a witness *viva voce*, to prove a deed or exhibit; but the witness must be examined in the office, upon interrogatories. *Carle-*

*ton v. Brightwell*, 2 Peere Williams, 463; and see 2 *How. Eq. Ex.* 518.

There can be no examination *viva voce* at the hearing, in any case where a minor is a party, not even to prove the attested copy of a judgment.

*Thursday, April 25th.*

## EVIDENCE—IMPEACHING CREDIT OF WITNESS.

O'KEEFFE and others v. ALLEN.

In a suit for a renewal the defendant examined a witness to prove the service of a notice upon the plaintiffs, requiring them to renew and pay up the renewal fines:—*Seemle* that it was not competent for the plaintiffs to read the evidence of another witness examined by them in the same cause, for the purpose of proving an admission by the defendant's witness that he had never served the notice in question:—and *Seemle*, that articles should have been exhibited to the credit of the defendant's witness, by the plaintiffs, to enable them to impeach his testimony.

In this case, the bill was filed praying for the renewal of a lease granted by William Allen, under whom the defendant derived, to William Smith, through whom the plaintiffs claimed. The principal ground of defence relied on by the defendant was, the service of a notice upon the plaintiffs, requiring them to pay up the renewal fines, and take out renewals, but with which, it was alleged, they had refused to comply. To prove the service of the notice, the defendant examined a witness of the

name of Shearman, who deposed to having served the notice in question. The witness was cross-examined by the plaintiffs, as to his having made a statement with respect to the service of the notice, different from that made by him in his depositions in the cause. And a witness of the name of Nash was examined by the plaintiffs, with a view to shew that Shearman had given a different account of the transaction on a former occasion. The plaintiffs further proved in the cause, an affidavit made by Shearman, in which he stated that, although frequently solicited by the defendant to depose to his having served the notice in question, he had refused to do so, in as much as it was not the fact that he had ever served such a notice.

At the hearing of the cause, it was now proposed on the part of the plaintiffs, to read the depositions of Shearman in answer to the cross-interrogatory exhibited to him by the plaintiffs, preliminary to the reading in evidence the depositions of Nash, which went to shew that the depositions of Shearman in the present case were quite at variance with his former statements as to the service of the notice in question. To this course an objection was taken by the defendant's counsel, upon the ground of the evidence being offered for the purpose of impeaching the credit of the witness, which, it was insisted, ought to have been done by exhibiting articles of impeachment in the usual manner.

Mr. *John Martley*, Q.C., and Mr. *B. C. Lloyd*, with whom was Mr. *Warren*, Q.C., for the plaintiffs.—It is quite true, that if the object of the plaintiffs were to impeach generally the credit of a witness examined in the cause, that could not be done, without, in the first instance, exhibiting articles of impeachment, and obtaining an order of the court to examine witnesses to impeach his testimony. But here, the object is, to disprove the truth of an allegation as to the service of a particular notice; that is a matter of vital materiality in the cause, and we have a right to disprove it in any manner we can, although the doing so, might consequentially involve the discrediting of the witness who has sworn to the service of the notice in question. The exhibiting of articles of impeachment would not answer the object here, for under articles of impeachment, the court would not permit us to examine as to matters which are material to the issue; there is always a reservation made in the order to examine witnesses under articles of impeachment, to the effect that no examination shall take place as to matters which are material to the cause, and the reason of this rule is, that all matters material to the issue can be proved in the cause itself.

CHIEF BARON.—My impression as to the practice in such cases is, that you may exhibit cross interrogatories to a witness as to his having

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given a different account of the transaction on a former occasion: but then you will be bound by the answer the witness gives; if he admits he has given a different account of the transaction, you have the full benefit of his admission; but if, on the other hand, he denies that he has done so, you cannot, without having previously exhibited articles of impeachment, examine another witness in order to contradict him on a point which is not in issue in the cause, viz., as to his having at some other time made statements at variance with his present testimony.

RICHARDS, B.—The difficulty here is, that the service or non-service of this notice is a matter material to the issue in the cause; it certainly is true, that a witness cannot be produced to contradict another, as to a matter wholly irrelevant to the issue; but it would seem to me at first view, a hard thing that the plaintiffs should not be at liberty to disprove the truth of an allegation as to a matter which is of vital materiality in the cause, although the doing so might indirectly affect the credit of a witness examined upon the other side. I merely, however, throw this out, and by no means desire to say, that my mind is made up upon the subject.

Mr. Bennett, Q.C., and Mr. Collins, Q.C., for the defendant.

The COURT\* called upon the defendant's counsel to say whether they would take an issue as to the service of the notice, which being declined, it became unnecessary to determine the question as to the admissibility of the evidence, the Court being of opinion, that the plaintiffs were, under the circumstances, entitled to a decree for a renewal without costs.†

\* The CHIEF BARON, and RICHARDS, Baron.

† See the cases of *Purcell v. M'Namara*, 8 Ves. 324; *Wood v. Hammerton* 9 Ves. 145.

The following case, which occurred in Michaelmas term last, may serve as an illustration of the practice with respect to the mode of exhibiting articles to the credit of a witness in this Court.

Wednesday, December 5th, 1838.

#### PRACTICE—ARTICLES TO THE CREDIT OF A WITNESS.

MURPHY v. FLANAGAN.

After publication passed, liberty given to exhibit articles to the credit of a witness, who, subsequently to his examination in the cause, had voluntarily made an affidavit that the entire of his evidence was false.

Mr. Berkeley, with whom was Mr. Sergeant Greene, moved, on the part of the defendant, for liberty to exhibit articles of impeachment to the credit of William Flanagan, the younger, a witness

who, subsequently to his examination in the cause, had voluntarily made an affidavit that the entire of his evidence was false.

examined by virtue of a commission had in this cause on the part and behalf of the plaintiff, and that a commission might issue to examine witnesses upon interrogatories in support of said articles, and that the defendant might be at liberty to examine witnesses by interrogatories, under said commission.

The affidavit upon which this motion was grounded, stated, that the suit was instituted for the specific performance of a parol agreement to lease certain lands: that the terms of the agreement were, principally, made out by the evidence of the witness whose testimony was about to be impeached, and that subsequently to his examination in the cause, the witness had voluntarily made an affidavit before a commissioner that the entire of the evidence which he had given was false. The principal object of the motion was to bring this affidavit under the notice of the court. Publication had passed, and the cause was in the term-list, for hearing.

Mr. Lane, with whom were Mr. Blackburne, Q. C., and Mr. Collins, Q. C., *contra*, for the plaintiff, objected to this as an attempt to re-examine a witness upon the same matters to which he had been examined in chief, for such would be the effect of proving an affidavit relating to the points in issue. This cannot be done, *Achber v. Shipley*, 5 Mad. 467. Besides, in all the cases in which applications of this kind have been made, it has been for the purpose of proving a mere *statement* or *declaration* of the witness at variance with his testimony, but here the application is for the purpose of proving a contradictory *affidavit*. He also objected to the motion as too late, being after the cause was in the list for hearing, and referred to *Kirkland v. Smith*, 1 Hog. 397, as an authority to that effect.

Mr. Berkeley, in reply.—The notice in this case follows the cases of

*Pigott v. Croxhall*, 1 Sim. & St., 467, and *White v. Fussell*, 1 V. and B., 151, where matters affecting the credit of the witness, and not material to the issue in the cause, were allowed to be proved. No attempt is made here to re-examine: the making of the affidavit alluded to is a substantive fact, going directly to the witness's credit, and not *ad idem* with the issue formerly examined to. We do not rely upon the affidavit to contradict the evidence in chief: we bring it forward only as a *fact* to impeach credit, and, in this point of view, *Pigott v. Croxhall* is directly in point. But the proper time to object to the proof of such a matter, would be at the hearing of the cause, when an application may be made (if deemed adviseable) to suppress the depositions proving the swearing of the affidavit. At present, we are entitled to the order we seek. Then, as to the time of making the motion, it can only be done in this country after publication passed, *Kirkland v. Smith*, 1 Hog. 397; the hearing will not be delayed, as there is no other long-cause day in this term, and we will undertake that publication of the depositions to credit shall take place before the first day of next term.

PENNEFATHER, B.—After publication has passed, I consider this to be very nearly a motion of course. I think the defendant is entitled to bring before the court matters affecting the credit and character of a witness, which are not material to the issues in the cause. As to the distinction which has been taken between the present and other applications of a similar nature, I can see no reason why this, which is a declaration made upon oath, should not be proved in an examination of this kind, just as well as a declaration made not upon oath. Therefore grant the motion, and let the defendant be at liberty to prove matters not in issue and not material

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to the cause; the examination to take place so that publication may pass the first day of next term, and let publication pass accordingly.

Articles were subsequently exhibited, under which the affidavit in question was proved by the commissioner before whom it was sworn, and several witnesses were examined to impeach the general

credibility of the witness; a cross-examination, at considerable length, on the part of plaintiff, also took place. The cause came on for hearing in the present (Easter) term, when the depositions of the witness in question were not offered in evidence, and the plaintiff being unable to make out his case without their aid, the bill was dismissed.

NOTE.—This court, it seems, has allowed articles to be exhibited to the credit of witnesses examined, before, as well as after, publication, *Kenney v. The Attorney General*, How. Eq. Ex. 868. In this respect the practice appears to coincide with that of the court of Chancery in England, *Honing v. Stott*, Bunbury, 46; *Gresley on Evidence*, 143: but, in the court of Chancery in Ireland, a different practice prevails, as articles of impeachment of the credit of a witness cannot there be exhibited until publication has passed in the cause, *Kirkland v. Smith*, Hog. 307. In England the course is to file articles to the credit of the witness, without the leave of the court, and then to apply, on motion, for liberty to exhibit interrogatories founded upon the articles, *Pigott v. Croxhall*, 1 Sim. & St. 467; which motion must be made upon a certificate that the articles have been actually filed, *Gresley on Evidence*, 140; *Russell v. Atkinson*, Dick. 532; but, in this court, such articles cannot be exhibited without an order for that purpose having been previously obtained: the application should, therefore, be for liberty to exhibit articles of impeachment, and to examine witnesses in support of them. See also *Lewry's Eq. Ex. Rules*, 59; and *How. Eq. Ex.*, 870.

Saturday, May 11th.

### EXTENDING RECEIVER, UNDER 5 & 6 W. 4. c. 55— JUDGMENT—MORTGAGE.

WALLER, Petitioner, v. BLENNERHASSETT, Respondent;  
And in six other Matters.

A mortgagee who has extended a receiver under the 5 & 6 W. 4. c. 55, to the matter of a judgment collateral to the mortgage, will not be allowed afterwards to set up the mortgage against a puisne judgment creditor who seeks to extend the receiver to his judgment.

Mr. T. B. C. SMITH, Q. C., moved to make absolute the conditional order in this matter, notwithstanding an affidavit filed as cause against it. The petitioner Waller obtained a judgment against the respondent, in Easter Term, 1816, and got a conditional order last Term, to extend the receiver, who had been appointed originally in one of the other matters, to the matter of his petition. The affidavit which was filed on the part of H. D'Esterre, the petitioner in the fourth matter, stated, that by indenture bearing date the 10th of April, 1813, the respondent mortgaged the lands over which the receiver was sought to be extended, to

secure the sum of £500, and also executed a bond with warrant of attorney, as a collateral security, upon which bond judgment was entered in Trinity term, 1817. That the mortgage and judgment were subsequently, in June 1817, assigned to Thomas Vereker and H. D'Esterre, in trust, and that the said H. D'Esterre was now the surviving trustee, and entitled to receive the money due on said mortgage and judgment. That the respondent had only a life estate in the lands, and that H. D'Esterre caused the receiver to be extended for the payment of the debt, so secured by the said judgment. The affidavit further stated that had H. D'Esterre been served with the order to appoint the receiver in the original matter, he would have opposed the same, and submitted that the petitioner Waller was not entitled to have the receiver extended to the matter of his petition, unless he should first redeem the mortgage.

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Mr. *T. B. C. Smith*, with whom was Mr. *John Francis Waller*, in support of the motion.—The question raised by the affidavit, namely, whether a receiver can be appointed over an equity of redemption, under the 5 & 6 *W. 4*, c. 55, is one on which this court and the court of Chancery do not agree. The present Lord Chancellor, and Master of the Rolls, holding, that by the true construction of the act, the receiver may be appointed where the mortgagee is not in possession of the rents (*a*). A distinction also may be taken between the case of appointing a receiver originally, and extending a receiver already appointed.—[*PENNEFATHER, B.\** Such a distinction may certainly be contended for. It is very desirable that the practice of both the courts of Equity should be uniform, and I am therefore disposed to let this case stand over for the full court.]—It may not be necessary to decide those points on the present motion, as it is submitted that D'Esterre was estopped from setting up his mortgage against the petitioner Waller. It is not competent for him, after having extended the receiver to the matter of his own judgment, and thus treated the estate as one over which a receiver could be extended, now to turn round and oppose another *bona fide* judgment creditor obtaining the same advantage.

Mr. *Bennett, Q.C.*, and Mr. *Thomas Fitzgerald, contra*, relied on the case of *Halley & Durand, Petitioners, v. Lord Langford, Respondent* (*b*), and insisted that if the order were made absolute, it would virtually postpone the rights of the mortgagee to those of a *puisne* judgment creditor, or compel the mortgagee to file his bill in order to obtain his priority.

\* *Solus.*

(*a*) Vide *Daly v. Bateman*, 5 Law Rec. 2 Ser. 107, and *Smith v. Egan*, 1 Sausse. and Scul. 244.

(*b*) 5 Law Rec. 2d Ser. 171; and see *Deane v. Travers*, 4 Law Rec. 2d Ser. 201.

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There was no objection to the order being made absolute, provided the petitioner were put under terms to admit the mortgagee's priority in taking the accounts. The mortgagee having extended the receiver under his judgment, is now in the character of a mortgagee in possession. The estate of the respondent who has but a life interest is a very precarious and scanty security, and if the present order be made absolute, the mortgagee will, in all probability, lose his money.

Mr. *Waller*, in reply.—The court cannot notice him in any other character than that of a judgment creditor. Besides, the effect of such terms would be to postpone the petitioner *Waller's* rights to those of a judgment creditor *puisne* to him, but prior to *D'Esterre's* judgment. It would however, be the interest of all parties, to permit the mortgagee to be paid according to his priority, without filing a bill, the costs of which must eventually come out of the common fund from which they were all to be paid.

The COURT was of opinion that under the circumstances, *D'Esterre* ought not to be permitted to set up the mortgage as a cause against the conditional order, and therefore,

Made it absolute.

Saturday, May 11th.

#### PRACTICE—PETITION FOR RE-HEARING.

FAUSSETT v. ORMSBY.

It is not necessary, by the practice of this Court, that a petition for a re-hearing should be presented within six months from the time of pronouncing the decree.

Such a petition must be signed by two counsel who were present at the hearing, but neither of them need be the leading counsel in the cause.

Mr. T. B. C. SMITH, Q.C., moved that this cause should be set down to be re-heard.

The application was grounded upon the plaintiff's petition, which set forth the material matters appearing on the former proceedings. The decree was pronounced on the 16th May, 1838.

Mr. *Walter Bourke*, and Mr. *James Blake*, Q.C., for the defendant, opposed the application. In the first place, according to the rule of this court, the petition for a re-hearing should have been presented within six months from the time the decree was pronounced. Secondly, the petition, not having been signed by the leading counsel in the cause, cannot now be used.

PENNEFATHER, B.,\* having consulted the Register, stated that there was no such rule as suggested by the defendant's counsel, as to the time of presenting a petition for a re-hearing in this court. With respect to the other objection, it is sufficient if the petition be signed by two counsel who were present at the hearing of the cause. Therefore,

Let this cause be set down to be re-heard for the first hearing day in the next term, the plaintiff undertaking to abide such order as the court shall make on such re-hearing.

\* *Solus.*

*Tuesday, May 14th.*

PRACTICE—DISMISSING BILL UNDER 1 & 2 VICT., c. 109, s. 1—  
REPLICATION—RULE TO DISMISS.

Rev. F. SYNGE v. FROST and others.

In this case the bill was filed in November, 1837, for the recovery of tithe composition, and in May, 1838, the defendants filed their answer. On the passing of the act 1 & 2 c. *Vict.*, 109, the plaintiff applied for relief under the 41st section, but without having dismissed his bill. On the 8th February, 1839, the defendants entered the usual rule for a replication within four days after service, or the bill to stand dismissed. This rule was served on the 9th of February, and would have expired on the 14th (the 10th being Sunday). On the 14th, the plaintiff entered a rule, that under the provisions of the 1 & 2 *Vict.*, c. 109, s. 1, the bill should stand dismissed without costs, and served notice on the same day that the rule had been entered, but the rule itself was not served until the 15th. The defendants having proceeded to tax their costs against the plaintiff, under the order of the 8th February,

Mr. *E. Fitzgerald*, on the part of the plaintiff, now moved that the taxation of the defendants' costs in this cause, under the order of the 8th of February, should be stayed, in as much as the plaintiff's bill stood dismissed without costs, under the order entered by him in pursuance of the statute. Counsel also applied for the costs of the motion.

Mr. *Bennett*, Q.C., and Mr. *T. Fitzgerald*, on behalf of the defendants, resisted the motion, on the ground that the rule to dismiss without costs had not been served until the 15th of February, when the rule for a replication had expired; and also, that the plaintiff had applied for relief under the act, without having dismissed his bill.

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The plaintiff in a suit for tithe composition, commenced previously to the 16th July, 1838, may dismiss his bill, without payment of costs, notwithstanding the usual rule for a replication or bill to stand dismissed, has been entered by the defendant, before the entry of plaintiff's rule to dismiss under the 1st sec. of the 1 & 2 *Vict.*, c. 109; and notwithstanding an application has been made by the plaintiff for relief under the 41st section of the same statute.

A bill does not stand dismissed, under the usual rule for a replica-

tior, until the costs have been taxed.



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PENNEFATHER, B.—The bill in this case would not, in my opinion, have stood dismissed under the order of the 8th February (even though the four days had elapsed from the service of the order), until the defendant had taxed his costs, as until then the plaintiff, by the practice of this court, might have entered a side-bar rule to retain his bill.

Then as to the other ground upon which this motion has been resisted, we have allowed the plaintiffs in several cases, both at the Law and Equity side of the court, to dismiss or discontinue their proceedings under the 1st section of the 1 & 2 Vict. c. 109, although they had previously presented memorials for relief under the 41st section of that statute.

HIS LORDSHIP refused to enter into any case of merits and granted the application, but without costs.\*

\* NOTE.—The following is the form of the usual rule to dismiss a bill for want of a replication: "Dismiss bill unless replication in four days."

Four running days are here meant, at the expiration of which time from the service of the order, if no notice shall have been taken thereof by the plaintiff, the defendant may proceed to have his costs taxed, and issue an attachment for the amount.

But by the present practice, the plaintiff may (as above intimated by the learned Baron), at any time previous to the taxation of the defendant's costs, without either filing a replication, taking exceptions to the answer, or or amending his bill, enter as of course a side-bar rule to retain the bill, on payment of 10s., being the costs of obtaining the Filacer's certificate of the date of filing the defendant's answer, and of the rule to dismiss:—and the mere entry of this rule has the effect of retaining the bill until the defendant obtain a second order, that the plaintiff do reply and pay the costs of the rule to dismiss, and of this order, in four

sitting days after service, or in default thereof, that the defendant be at liberty to proceed on his rule to dismiss, notwithstanding the rule to retain.

On service of this order, unless the plaintiff pay the costs therein mentioned, and either file a replication, except to the answer, amend his bill, or apply specially to the court to extend the time for doing so, at the expiration of the four days, on an affidavit of service, the rule is made absolute in the office, and the bill stands absolutely dismissed.

But in case the plaintiff file a replication without paying the costs of the order to dismiss, the defendant may, instead of the last mentioned rule, enter another in the following form:—"Plaintiff to pay the costs of dismiss and of this motion in four days (*four sitting days*), or liberty to proceed notwithstanding replication filed."

See further upon the subject of dismissing a bill for want of a replication, *Lowry's Eq. Ex. Rules*, pp. 11, 12, &c., and *notes*, where the practice is clearly stated.

## CHANCERY.

*Thursday, May 30th, 1839.*ASSIGNMENT OF JUDGMENT—RELATIVE RIGHTS AND  
DUTIES OF CONUZOR AND ASSIGNEE.FERRALL *v.* BOYLE,BOYLE *v.* FERRALL.

This was a suit for an account, brought by Ferrall, the conuzor of a judgment, against Boyle & Co., to whom the judgment had been assigned, Ferrall alleging that the judgment had been paid off.

The principal questions discussed in the case were, *first*, whether the conuzor of a judgment can have credit for payments made by him to the original conuzee, after the latter has assigned away the judgment, the assignment being regularly enrolled under the statute,\* but the conuzor being ignorant that such assignment has taken place.

*Secondly*, whether the circumstance that the original conuzee had taken proceedings by outlawry, and got a grant in custodiam of the conuzor's lands in virtue of his judgment, made any difference in the case, or rendered it incumbent on the assignee of the judgment, who had enrolled his assignment, to give notice to the conuzor to discontinue all further payments to the original conuzee.

*Thirdly*, whether an assignee, who had notice that such custodiam proceedings had been had, and who did not warn the conuzor to discontinue all payments to the original conuzee, can avail himself of the enrolment of the assignment under the statute, and refuse credit to the conuzor for payments made by him in ignorance of the assignment.

Where the conuzee of a judgment, who had proceeded to outlawry thereon, and obtained a grant of the conuzor's lands in custodiam, afterwards assigned the judgment, under the statute, without the knowledge of the conuzor, the assignee having had notice of the custodiam proceedings, and not having given the conuzor notice of the assignment, was held bound to give him credit for sums received by the conuzee subsequent

to the assignment, out of the rents of the lands held in custodiam.

A person taking an assignment of a judgment should require the conuzor to join, or should give him notice.

\* The 9 Geo. 2, c. 5., of which the first four sections are as follows:—

"Whereas judgments, statutes-staple and statutes-merchant, are frequently assigned for valuable considerations, and to protect the purchase of estates, but are no more than equitable securities in the hands of the assignees: and whereas assignees of such judgments, statutes-staple or statutes-merchant, as the law now stands, cannot revive or discharge the same in their own names, but in

"the name of the conuzees of such judgments, statutes-staple or statutes-merchant, or their representatives, which is often attended with very great inconveniences, and the conuzee may, after such assignment, enter satisfaction on the record of the said judgments, statutes-staple or statutes-merchant, without the knowledge or consent of the assignee: for remedy whereof be it enacted, that from and after the first day of next Easter term, where any co-

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*Nolan's judgment of 1823, *ex custodiam* proceedings thereon.*

*Transactions of Ferrall with Nolan and his other creditors.*

The circumstances under which the above questions arose were as follows:

The plaintiff, Ferrall, had succeeded, on the death of his uncle, to considerable estates in the county of Roscommon, and being in embarrassed circumstances, he, in 1823, executed his bond and warrant to Patrick Nolan, for £4026. 8s. 10d., and went abroad, having appointed the said Patrick Nolan agent and receiver of his rents.

Nolan entered judgment on the above bond, in Michaelmas, 1823, and Farrell being abroad, Nolan took proceedings by outlawry against him, and obtained a grant in *custodiam* and an order of the court of Exchequer, in February, 1825, on Ferrall's tenants, to pay their rents to him as custodee.

Nolan purchased several other judgments from other creditors of Ferrall, amounting to about £8960. 14s. 1d. He took like proceedings by outlawry thereon, which it is unnecessary here to state more particularly.

Ferrall returned to Ireland, in 1828. He found his affairs still in disorder, and conceiving that Nolan must by this time have been paid off out of the rents, he required him to come to an account.

Disputes ensued, pending which Ferrall was arrested, in November, 1828, by one Moriarty, another of his creditors, and remained in prison several years.

The disputes being Ferrall and Nolan still continued, and in January, 1829, Ferrall being still in prison, Nolan furnished his accounts, claiming a balance of £22,874. 15s. 8d., and remained in receipt of the rents.

Ferrall protested against the accuracy of the account, and it was referred to one Strickland to adjust it. He made his award, 17th December, 1829, and thereby found, that debiting Nolan with the rents, the balance still remaining due by Ferrall to Nolan was £15,396. 5s. 9d. on foot of all accounts up to 5th May, 1829.

The award, however, failed in adjusting the differences between the

"nuzee or conuzees of a judgment  
"or judgments, statute-staple or  
"statute-merchant, his, her, or  
"their executors or administrators,  
"shall assign the same to any per-  
"son or persons whatsoever, such  
"conuzee or conuzees, his, her or  
"their executors or administrators,  
"shall also perfect a memorial of  
"such assignment, under his, her  
"or their hand and seal, upon  
"parchment or vellum, attested by  
"two or more credible witnesses,  
"which memorial shall contain the

"name or names of the person or  
"persons to whom the same shall  
"be assigned, and the sum or sums  
"of money mentioned in such as-  
"signment or assignments to be  
"remaining due and unsatisfied  
"upon such judgment or judgments  
"statute-staple or statute-merchant,  
"with the day and year when such  
"assignment or assignments is, are,  
"was or were perfected, and that  
"one of the witnesses to such me-  
"morial, who shall be a witness to  
"the assignment of such judgment,

parties. Ferrall wished to strike off an item of £3000, and other large sums, from the credits to Nolan. Nolan, on his part, said, that the above-mentioned judgment of 1823 (concerning which the questions now arose in the present suit) had been wrongly omitted by Strickland in taking the account.

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In order to accommodate matters, a deed was executed by Ferrall and Nolan, bearing date 30th July, 1831, by which it was agreed that the £3000, objected to by Ferrall, should be struck off; and, on the other hand, that the said judgment of 1823 should be brought into account; and it was further agreed that if Ferrall should procure his other creditors to take their demands by instalments out of the residue of the rents, after payment of £3000 a-year to Nolan, Nolan was to accept that sum yearly, until his demands should be paid off, but without prejudice to the *custodiam* obtained by him.

Deed of July,  
1831.

Ferrall still remained in prison. The proposition contained in the above deed, as to paying £3000 a-year only to Nolan, did not appear to have been carried into effect, but a deed, bearing date 25th June, 1834, was executed, by which Ferrall, in order to raise money to pay off his creditors, vested his property in O'Connor and Veevers, as trustees, who were to pay Nolan £2500 a-year (which he agreed to accept, in-

Deed of June,  
1834.

"statute-staple or statute-mer-  
chant, shall make an *affidavit at*  
"the foot of such memorial of the  
"true perfection of such assign-  
ment and memorial, before the  
"respective officer or officers where  
"such judgment or judgments,  
"statute-staple or statute-mer-  
chant, is, are or shall be entered,  
"his or their legal deputy or de-  
puties, or before any one of the  
"judges of the Four-Courts, in  
"Dublin, or before any one of the  
"judges of His Majesty's courts at  
"Westminster, who are respect-  
ively hereby empowered to take  
"such affidavit, which *memorial*  
"and *affidavit shall be lodged in the*  
"proper office where such judg-  
ment, statute-staple or statute-  
merchant, is or shall be entered:  
"and the several officers of the  
"said courts are hereby required  
"to enter such memorial of such  
"assignment, statute-staple or  
"statute-merchant, in a roll or rolls  
"of parchment or vellum, to be  
"kept for that purpose in such

"respective office or offices where  
"such judgment or judgments, sta-  
tute-staple or statute merchant,  
"is, are or shall be entered: and  
"such officer or officers is and are  
"hereby required to indorse on  
"such assignment or assignments  
"the day of the month and year,  
"and hour of the day, whereon  
"such memorial or memorials was  
"or were so lodged and proved:  
"and for the more easy and speedy  
"method of finding such assignment  
"or assignments, such respective  
"officer or officers shall enter the  
"number and roll where such as-  
"signment or assignments is or are  
"registered, at the foot of each  
"respective judgment or judg-  
ments, statute-staple or statute-  
merchant, so assigned; for all  
"which indorsements, entries and  
"affidavits upon such respective  
"memorial the sum of six shillings  
"and eight-pence shall be paid;  
"and no more.  
"II. And be it further enacted,  
"that from and after such time as

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Money raised  
on annuities,  
31st July,  
1834.

stead of £3000) until his demand was paid off. Nolan was to facilitate the raising of £15,000 to pay off creditors, by giving priority to the persons advancing it, and Messrs. Stewart and Kincaid were appointed to receive the rents for the trustees.

Money was accordingly afterwards raised, by way of annuities on the estates. Nolan joined in the securities to the annuitants, directing O'Connor and Veevers, the trustees, to pay the annuities first, and then his £2500 a-year, until the sums due on foot of his *custodiam* should be paid off, and he reserved a right to resort to his grants in *custodiam* in case any default should be made in paying the £2500 a-year.

Money having been thus raised, Ferrall obtained his liberation from prison, in August, 1834; and again called on Nolan to come to an account.

Nolan had continued in receipt of Ferrall's rents until the conveyance to O'Connor and Veevers, as trustees, and the appointment of Stewart and Kincaid, as receivers. Subsequently to that date, he received several sums through their hands, on foot of the rent-charge or annuity of £3000, afterwards reduced to £2500 by the deed of June 1834. These payments by Stewart and Kincaid continued down to 1st December, 1834, although Nolan had, in the mean time, as will be mentioned hereafter, assigned away the judgment of 1823.

"such memorial or memorials of  
"such assignments shall be entered  
"on such roll as aforesaid, it shall  
"and may be *lawful for the assignees* or assignees of such judgment or judgments, statute-staple or statute-merchant, his, her or their executors, administrators or assigns, *and for no other person* or persons whatsoever, to revive such judgment or judgments, statute-staple or statute-merchant, from time to time, in his, her or their own name or names, and take out one or more execution or executions on the same, in the name or names of such assignee or assignees, his, her or their executors or administrators, and to sue forth execution or executions thereon, reciting the special matter, and also to *discharge and release the same*: and also in his, her or their own name or names, to *enter satisfaction* on the record of such judgment or judgments, statute-staple or statute-merchant, in as full and am-

ple a manner, to all intents and purposes, as if the conuzee or conuzees of such judgment or judgments, statute-staple or statute-merchant, his, her or their executors or administrators, could or might do; and that *the conuzor* or conuzors of such judgment or judgments, statute-staple or statute-merchant, his, her or their executors, administrators or assigns, *may, upon payment to such assignee or assignees, plead payment specially* to such assignee or assignees: *And* that such assignee or assignees, their executors or administrators, *may*, from time to time, *assign* the same over in manner aforesaid, and such assignment or assignments shall be proved and registered in the respective offices in manner as aforesaid: and such assignee or assignees may revive and sue out execution or executions, in their own name or names, and discharge and acknowledge satisfaction on such judgment or judgment

Pending the above transactions between Ferrall and Nolan, the latter, who was also in embarrassed circumstances, had been raising money on his own account, by various means, and without the knowledge of Ferrall, had assigned the judgment of 1823, by way of pledge, to secure advances made to himself, and had also made over, for the like purpose, his right to receive the £2500 a-year.

These transactions between Nolan and his own creditors, so far as related to the judgment of 1823 (now in question), were as follows:—

On the 9th January, 1833, Nolan, being then indebted to Brown and Co. in a sum of £1400, in order to secure the same, by deed assigned the judgment of 1823 to them, by way of pledge, and in that deed alleged that the whole sum of £4026. 8s. 10d., Irish currency, remained due by Ferrall on foot thereof.

On 18th July, 1833, another assignment of the judgment took place, Nolan having paid off Brown and Co. their £1400, by raising a sum of £1900 from one Robert Gray, and in order to secure the latter sum, Nolan procured Brown and Co. to join him in making this last-mentioned assignment to Robert Gray, the deed stating that £3844. 7s. 2d., British, was then due thereon by Ferrall, for principal, interest and costs.

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*Transactions  
between Nolan  
and his own  
creditors.*

*Jan. 1833.  
First assign-  
ment of the  
judgment.*

*July, 1833.  
Second as-  
signment of  
the judgment.*

"ments, statute-staple or statute-  
"merchant, in manner aforesaid,  
"any law, usage or custom to the  
"contrary in any wise notwith-  
"standing.

"III. Provided always, that the  
"conuzor or conuzors of such  
"judgment or judgments, statute-  
"staple or statute-merchant, his,  
"her or their heirs, executors or  
"administrators, *shall have the*  
"same remedy and defence, both  
"in law and equity against the as-  
"signee or assignees of such judg-  
"ment or judgments, statute-staple  
"or statute-merchant, his, her,  
"or their representatives, *which*  
"he, she, or they could or might  
"have had against the conuzee or  
"conuzees of the same, his, her or  
"their representatives, in case no  
"such assignment or assignments  
"had been made.

"IV. And be it further enacted,  
"that it shall and may be lawful  
"for the assignee or assignees of  
"any judgment or judgments, sta-  
"tute-staple or statute-merchant,

"already assigned, his, her or their  
"executors or administrators, to  
"perfect such memorial, in manner  
"aforesaid, and to have the same  
"entered, and to revive and sue  
"out execution or executions, and  
"to acknowledge satisfaction in his,  
"her or their name or names, and  
"assign such judgment or judg-  
"ments, statute-staple or statute-  
"merchant, in manner aforesaid.

Sec. V., *et seq.*, relate to the law  
of distresses, and other matters.

This act was amended by the  
first section of 25 Geo. 2, c. 14,  
which is as follows:

"Whereas some doubts have ari-  
"sen upon the construction of an  
"act of Parliament, passed in this  
"kingdom, in the 9th year of the  
"reign of his present Majesty, en-  
"titled *an act for the more effectual*  
"*assignment of judgments, and for*  
"*the more speedy recovery of rents,*  
"*by distress,* so far as the said act  
"relates to the assignment of judg-  
"ments and statutes in the several

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*Nolan's trans-  
actions with  
Boyle & Co.  
previous to  
third assign-  
ment, shewing  
notice to  
Boyle & Co.*

On 31st July, 1834, Nolan having been receiving advances from Boyle and Co., as bankers, he, in order to induce them to continue their advances, procured a letter from Messrs. Stewart and Kincaid, the receivers appointed under the deed of 25th June, 1834, which was as follows :

" DEAR SIR,

" You will please mention to Messrs. Boyle and Co. that we shall pay them, pursuant to the *memorandum* between Mr. Kincaid and you, on the 1st September next, £1000; on 1st December following, £625; and every three months after, so long as we continue agents of Mr. Farrell's estates, the sum of £625, on every 1st March, 1st June, 1st September and 1st December following, *until your custodiam debt shall be discharged.*

" Your obedient servants,

" STEWART and KINCAID."

31st July, 1834."

[The memorandum referred to in the above letter bore date the December previous, and was as follows :— " Mr. Nolan and Mr. Kincaid, " to prevent further misunderstanding, have agreed to the following arrangement as to payments, viz., Mr. Nolan to receive, at present, " £1250, and, on 3d March next, £750 more : on the 1st June £1000, " and 1st December, £1000. Mr. Nolan *not to be considered as thereby " waiving his right to dispose of as he may think proper any surplus that " may be at the end of the year after the above payments ; and in case " Mr. Nolan should, in the mean time, accept the rent-charge of £3000,*

" courts of law therein mentioned, " for the removing of which doubts " *be it declared and enacted*, that " every assignee or assignees of " every judgment or judgments, " statute staple or merchant, that " are now assigned, or which here- " after shall be assigned on record, " by virtue of the said act, his, her " or their executors, administra- " tors or assigns, may not only re- " vive such judgment or judgments, " statute or statutes, from time to " time, in his, her or their own " name or names, and take out one " or more execution or executions " thereon for recovery of his or " their demands thereon, as by the " said act, among other things, is

" directed, but that also such as- " signee or assignees of such judg- " ment or judgments, statute or " statutes, now assigned, or here- " after to be assigned by virtue of " the said act, his, her or their ex- " ecutors, administrators or as- " signs, may bring an action of " debt, or otherwise proceed there- " on, in his, her or their own name " or names, and be *considered to all " intents and purposes in the place, " stead and condition, either in law " or in equity, of the assignor or as- " signors ; any thing in the said act " contained, or otherwise, to the " contrary in any wise notwith- " standing.*"

"under the deed between him and Mr. Ferrall, the above quarterly payments then to be reduced to £750. Dated 4th December, 1833."

"PATRICK NOLAN.—J. KINCAID."]

On 18th February, 1835, Farrell filed his original bill in this court, against Nolan, stating that the judgment of 1823 (now in question) had been paid off, and praying an account of the rents and a receiver. The subpoena to answer this bill was served on Nolan on the 19th February, 1835; and on the following day, 20th February, 1835, a third assignment of the judgment of 1823, was made by Nolan and Robert Gray to Boyle and Co. by way of pledge, to secure the re-payment of £2500, then lent by them, and also to secure such further sums as Boyle and Co. might thereafter advance. Robert Gray, being paid off by the sum advanced by Boyle and Co., joined Nolan in this deed, by which, therefore, the legal estate in the judgment of 1823 was transferred to Boyle and Co., and Nolan thereby covenanted that £4205. 5s. 7d., British, remained due by Ferrall thereon, for principal, interest and costs.

All the assignments were duly enrolled under the statute.

About 11th June, 1835, Nolan became a bankrupt.

On 29th July, 1835, Ferrall filed a supplemental bill, making the assignees of Nolan, and also Boyle and Co., with several others, parties defendants. He stated that he had lately discovered the assignments of the judgment effected by Nolan, of which he stated he had never received any intimation until after the bankruptcy of Nolan; and that considerable sums had been received by Nolan, both before and since the assignment, although, in fact, the judgment of 1823 had been long before paid off, and he prayed the same relief against Boyle and Co., in respect of the said judgment, as he had prayed against Nolan by his original bill.

In October, 1835, Boyle and Co. answered Ferrall's supplemental bill, and on 24th December, 1835, filed a cross-bill against Ferrall, stating that the judgment of 1823 had been assigned to them by Nolan and Gray, together with another judgment obtained by one Abraham Lane against the said Ferrall, and that they had paid £2500 on the security thereof; and also stating that at least at the time of the *first* assignment to Brown and Co., on 9th January, 1833, the whole sum was certainly due on the judgment of 1823: that all the acts of Ferrall, subsequent to that time, were calculated to create the supposition that the money was still due thereon, and that his acts, together with the letter of Stewart and Kincaid, of July, 1834, whom they considered the agents of Ferrall, had led them to believe Nolan's statement that the money was still due, and they prayed that the judgment of 1823 (and also that of 1818) should be declared *valid and subsisting* for the amount of their demand, and that an account might be taken of the sum due by Ferrall on foot thereof, and of the sum due to them by Nolan, and a receiver, and that their bill might be taken as a cross-bill as against Ferrall.

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Original bill.  
Ferrall v.  
Nolan. 18th  
February, 1835

Third assign-  
ment of the  
judgment, 20th  
February, 1835

Supplemental  
bill, 29th  
July, 1835.

Cross-bill,  
24th Decem-  
ber, 1835.



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*Rolls order,  
on consent,  
July, 1836.*

[Boyle and Co.'s counsel, at the hearing, gave up the case as to the judgment of 1818, which renders it unnecessary to enter into the circumstances connected with it.]

Before the causes were ripe for hearing, Boyle and Co., on the 12th July, 1836, moved, at the Rolls, for the appointment of a receiver, and an order was then made, *by consent*, referring it to the Master to take an account of the sums due on foot of the custodiam proceedings of Nolan against Ferrall, and on foot of the award of 17th December, 1829, and on foot of the judgment of 1823 (that now in controversy), and the motion for a receiver was directed to stand over until the return of the report.

*Report under  
Rolls order,—  
that Nolan  
had been over-  
paid.*

Under that order the Master made his report, 6th January, 1838, and thereby found that on foot of the said award and judgment, and all dealings between Nolan and Ferrall, Nolan had been *overpaid*, by a sum of £4982. 1s. 5d., giving Ferrall credit for the sums received by Nolan under his custodiam proceedings, and from Messrs. Stewart and Kincaid.

On the 5th February, 1838, the matter was again debated, on notice and cross-notice, at the Rolls, when His Honor ordered that Boyle and Co.'s motion for sending back the report be refused, with costs, this order to be without prejudice to the rights of the parties to insist at the hearing that the rents received by Nolan, after the assignment of the judgment of 1823, ought not to be applied in payment thereof.

[His Honor was said to have intimated an opinion on that occasion, that Ferrall was not entitled to credit for any sums paid to Nolan after the date of the assignment.]

Both causes now came on to be heard together.

*Arguments for  
Ferrall.*

Mr. Warren, Q. C., Mr. Keating, Q. C., Mr. Blake, Q. C., and Mr. Guthrie, for Ferrall.

*That the rule  
is settled as to  
a mortgage,  
and that the  
case of a judg-  
ment is analo-  
gous.*

All payments to the conuzee, though after the assignment, are good, if the conuzor had no notice of the assignment. For though there are no cases establishing this principle with regard to a *judgment*, yet there are cases on *mortgages* which are analogous, and which decide that payments to the mortgagee by the mortgagor, after assignment without notice, are good: *Mathews v. Wallwyn* (a); *Williams v. Sorrell* (b); *Chambers v. Goldwin* (c); *Norris v. Marshall* (d).

At all events, the assignee is bound by payments subsequently made by the conuzor, without notice of the assignment, where, as in this case *custodiam* proceedings have been taken on the judgment, giving rights to the creditor independent of that judgment. For a person taking an assign-

(a) 4 Ves. 126.

(c) 9 Ves. 264.

(b) 4 Ves. 389.

(d) 5 Mad. 481.

ment of a judgment is bound so to act that the conuzor shall not be made to pay *twice*.

It would be most *inconvenient*, to hold that the conuzor of a judgment is never to pay even a gale of interest to the conuzee, without sending to search whether he has assigned it away or not. The universal practice is, that the party taking the assignment of a judgment inquires from the conuzor how the account stands between him and the conuzee. Boyle and Co. neglected to make any such inquiry, and must abide the consequences.

Here Ferrall had no notice of the assignment; but Boyle and Co. had notice of the proceedings in custodiam.

The letter of July 1834, and the memorandum therein mentioned, gave notice to Boyle and Co. of the proceedings in custodiam and of the deed of June 1834.

The equity of Boyle and Co. at best can only be to the extent of the £2500, which they paid at the time of the assignment to them. But several other collateral securities were assigned to them at the same time, for the purpose of securing that £2500: some of those collateral securities they have realized. It is proved in the cause, that they have realized £2700 by those collateral securities: therefore the £2500 advanced by them is more than repaid: besides the assignment to them was made *lis pendens*.

Nor can they rely on the two previous assignments which took place in 1833. Assignees of a judgment are liable to all the equities affecting it at the time of the assignment; and the deed of 1831 created an equity which over rode all the assignments.

Mr. Blackburne, Q. C., Mr. W. Brooke, Q. C., Mr. Dickson, Q. C., and Mr. Whiteside, for Boyle and Co.

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*As inconvenient.*

*Arguments for Boyle & Co.*

The analogy relied on, between a judgment and a mortgage, does not hold. In the case of a mortgage, the debt, which is the principal thing, is not assignable at law. The original mortgagee still remains the *legal* creditor; and, therefore, payment to him discharges the debtor, unless the latter had notice of the assignment. But the 9 G. 2, c. 5, makes the assignee of a judgment the creditor at *law* as well as in equity. The rule which has been adopted, as to payments made to the original mortgagee, rests on the principle that where it is a measuring cast, he who has the *legal* right is preferred; and, therefore, the mortgagor, having obtained a *legal* discharge by paying the legal creditor, is preferred to the assignee who has merely an equitable title. *Matthews v. Wallwyn*, and *Williams v. Sorrell* are therefore not authorities to rule the case of a judgment assigned under the statute.

*That the case of a mortgage is not analogous.*

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*That the case  
of a bill of  
exchange is a  
closer analogy*

*As inconvenient.*

*From the  
words of the  
statute.*

*From the acts  
of Ferrall.*

The case of a bill of exchange is a closer analogy than a mortgage, because *there* the debt is legally assignable. The indorsee of a bill of exchange, or the assignee of a judgment, has a legal right and a legal remedy, which a court of equity ought not to take away from him, unless he has been guilty of fraud.\* Payment to a first assignee is not pleadable to a *sci. fa.* brought by a second assignee; *Purdon v. Purdon*(a).

Greater inconveniences would follow from the doctrine of Ferrall's counsel than they allege would ensue from ours. The object of the act was to render judgments easily assignable. Is no assignment to take place until the conuzor has been discovered and notice given to him? He may be abroad. Then *evidence* of the notice must be preserved: it will be a part of the title to the judgment, according to the doctrine of the other side.

In January 1833, when the judgment of 1823 was assigned by Nolan for the first time, the whole sum of £4026. 8s. 10d., Irish, was due on it. That assignment was registered: if Ferrall afterwards paid sums to Nolan, instead of to the assignee, he paid them in his own wrong, and the assignee is not to suffer by that. The act says, "the assignee is to be considered, both in law and in equity, in place of the assignor;" therefore the assignee is the only person to whom the conuzor is entitled to make payments, to stand good either at law or in equity. The act says, "no person but the assignee shall be able to release the debt."

The letter of 31st July, 1834, is dated the same day as the deed, and it was obtaining that letter that was the consideration that induced Nolan to execute the deed. The deed recites that a considerable sum was due on foot of the judgment of 1823. The deed is registered, and the memorial contains that recital. Thus Ferrall enabled Nolan to put on the registry an acknowledgment by him that a considerable sum was

(a) 1 Hud. & B. 229.

\* This suggestion was cited from 2 *Powell on Mortgages*, 908, a. "If the debt be a negotiable security, as a bill of exchange secured by a mortgage, the indorsee or assignee would, it seems, be entitled to have his money from the mortgagor, on liquidating the account, though he paid before: because the indorsee or assignee has a legal right to the note, and a legal remedy at law, which a court of equity ought not to take

"away from him." This is adopted by Coote, 375, but no case was cited following up the suggestion. The argument was answered by Mr. Blake, for Ferrall, by saying, that if the analogy held at all, it would only hold in the case of a bill of exchange, indorsed *after it was due*; in which case it would be subject to the equities affecting it at the time of such indorsement, and *Powell's* suggestion would not hold good.

due on the judgment. On the strength of that acknowledgment Boyle and Co. became the purchasers. May, 1839.

Ferrall, by standing by, and allowing Nolan to deal with the judgment, drew in Boyle and Co. In *Chambers v. Goldwin* (a), Lord Eldon says, "If the mortgagor is a party to a transaction authorising the assignee to believe so much is due to the mortgagee, the mortgagor cannot complain, if by his act the assignee is misled."

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As to the *lis pendens*, Gray was not a party to the pending suit: he was the person in whom the judgment was vested. He assigned to Boyle and Co.: neither assignor nor assignee were parties to the *lis pendens*. It is true Nolan joined, but *lis pendens* between incumbrancers shall not prejudice the conveyance of the body of the estate. *Wortley v. Lord Scarborough*. (b)

Boyle and Co. are purchasers for valuable consideration, without notice. They thought that the custodiam in the letter of 1834 meant another custodiam.

LORD CHANCELLOR.—Whether, after an assignment of a judgment, the assignee is bound to give notice to the conuzor, is a question that I shall require time to consider, before I give any opinion. It is admitted that there is no case reported on the point. 1st June, 1839.

There have been cases as to mortgages. It is said, on one side, that these cases must govern the present. On the other side it is contended that judgments and mortgages stand on different grounds, because, in the case of a mortgage, the legal interest in the debt is not assignable.

If it were necessary to decide that point, I do not see any sound distinction between the case of a mortgage and a judgment; but it is not necessary to decide that here. That is not exactly the question in this case.

The question here is, whether, where the conuzee has gone into possession of lands, as creditor, having issued execution on his judgment, and known by the assignee to be so in possession—whether notice is not necessary to be given by the assignee to the conuzor in such a case? I am disposed to think it is necessary. I am not now giving judgment, but I think the letter of June, 1834, and the memorandum mentioned in it, shew that the assignee must have known that Nolan had obtained a grant in custodiam.

Tuesday, 25th June.

LORD CHANCELLOR.—In this case it appears that the judgment was acknowledged in the year 1823, for the principal sum of £4026. 8s. 10d. Judgment.

(a) 9 Ves. 269, originally in 5 Ves. 834.

(b) 3 Atk. 392.

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There have been three several assignments of that judgment. The first, in January, 1833, by Nolan, to Brown and Co., to secure £1400; secondly, by Brown and Co. and Nolan, in July, 1833, to Robert Gray, who advanced £1900 upon it; and, thirdly, on 20th February, 1835, it was again assigned by Gray, in which Nolan joined, to secure £2500 to Boyle and Co.

On 18th February, 1835 (two days before this last assignment), Ferrall had filed a bill against Nolan, in which he alleged that the judgment of 1823 had been paid off; and on the following day, the 19th, Nolan had been served with subpoena to answer that bill. However, after that he assigned to Boyle and Co.

About June, 1835, Nolan became bankrupt; and on 29th July, 1835, Ferrall filed a supplemental bill, making Boyle and Co. defendants.

On the 24th December, 1835, Boyle and Co. filed a cross-bill; and an application was made by them, in the Rolls, for a receiver, on 12th July, 1836, when, on *consent* of all the parties, it was referred to the Master to inquire into the state of the accounts. The Master made his report, finding that a sum of nearly £5000 was due by Nolan to Ferrall, Nolan having been in fact largely overpaid.

An application was then made to send back the report to the Master. The Master of the Rolls refused that application, because the reference had been made on *consent*; but he intimated an opinion that the plaintiff in the cross-bill would not be affected by the payments made to Nolan after the date of the assignment of the judgment.

I would feel great difficulty in differing from the Master of the Rolls, but I think if the case were to come before him, in the shape it has now assumed, he would be of opinion with me. His opinion was only given in anticipation of what the case might be at the hearing.

Now the first question which has been raised is, under the statute 9 G. 2, c. 5, whether a payment by the conuzor to the conuzee, after an assignment of which the conuzor has not notice, is a good discharge as against the assignee? I shall first refer particularly to the statute. It is entitled an act for the more effectual assigning of judgments. It recites that judgments are frequently assigned for valuable consideration, and to protect the purchase of estates; but that in the hands of the assignees they were no more than equitable securities, and that assignees could not revive or discharge them in their own names, which it recites to be inconvenient.

It then recites, that after such assignment the conuzee may enter satisfaction on the record. Here was one mischief that the act was intended to guard against. But it does not seem to contemplate the case of *bona fide* payments by the conuzor after assignment.

It then enacts, that when a judgment is assigned, a memorial shall be perfected, and an affidavit made of its due perfection. And then the

second section enacts, that after the assignment has been enrolled, it shall be lawful for the assignee, *and for no other person*, to revive the judgment in his own name, and to take out execution, and to discharge or release it. Then it provides, that the conuzor, on payment to the assignee, may specially plead payment to such assignee; but it says nothing of payments to the original conuzee of the judgment. That remains as before the act.

The third section makes a proviso that the conuzor shall have the same remedy and defence, *both in law and equity*, against the assignee, that he might have had against the conuzee.

Now this act secures the *legal* as well as the equitable rights of the conuzor. It recites that the conuzee might have entered satisfaction on the record, without the knowledge of the assignee, but it does not say that the conuzor shall not have credit for *bona fide* payments.

Before the statute, the conuzee might have received payment of the judgment, and entered satisfaction on the record after he had assigned it: this would have been fraud in him; but how could the conuzor have been affected by that, unless he knew of the assignment? Again, the conuzee might have made a second assignment: this is provided for by enabling the first assignee to enrol his assignment. It regulates the priorities so far as its provisions are not pursued, but it leaves the equities of the parties as before. If the first assignee does not enrol his assignment, and if the second assignee pursues the statute, he will have a better title than the first assignee. The enrolment, however, does not appear intended to affect the conuzor with notice of the assignment. It contains no provision which would warrant the court in affecting the conuzor, or any person, with *notice*, any more than the general Registry Act. There is nothing in the act affecting the rights of the conuzor, except the part I have referred to: his name is never mentioned in the first and second section, except where it is provided, in the second section, that he may pay the assignee, and plead such payment specially; and his rights, by the third section, are secured. There is nothing in the act binding the conuzor to look after the title of the assignee; and if we were to decide that he is to be held bound to look after the title of the first assignee, he must be equally bound to look after the title of the second assignee. There is nothing disabling him from discharging his own debt to his own creditor, if he does it honestly, and without notice that his creditor has parted with his rights.

Then, as to authority, it is agreed that there is no case bearing directly on the point. No precise decision has been found either here or in England, as to the equities which, independent of the statute, would arise between the assignee and the conuzor: but two cases have been cited as to mortgages—*Matthews v. Wallwyn*(a) and *Williams v. Sorrell*(b), which are both decisive that payment by the mortgagor to the

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The enrolment of the assignment of a judgment does not operate as *notice*, any more than the registry of a deed.

(a) 4 Ves. 119.

(b) 4 Ves. 389.

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Payment to the  
the original  
mortgagee, af-  
ter an assign-  
ment of which  
the mortgagor  
had no notice,  
is good; and  
in this respect  
the case of a  
judgment can-  
not be well dis-  
tinguished  
from a mort-  
gage.

mortgagee, after an assignment of the mortgage, but without notice, is good. It is contended, that the case of a judgment is different from that of a mortgage; for that in the case of a mortgage there is no legal assignment of the interest in the debt, but only of the interest in the land. I think it would be difficult to sustain a distinction between the case of a judgment and a mortgage, on this ground. For the question is as to the equities of the parties. An assignment of a mortgage is looked on in equity as an assignment of the debt, as well as a conveyance of the lands. In *Matthews v. Wallwyn* (a), Lord Eldon says, "The real transaction is an assignment of a debt—that debt collaterally secured by a charge upon real estate." And in the subsequent case in the same volume, the same judge rules the same point, and refers to it as clearly settled. The last case is a very strong case on the present question; for the lands there were in Middlesex, and there was a memorial registered under the statute. That makes the case quite similar to the present, where the assignment of the judgment is enrolled.—Sir Wm. Grant's observations, in *Jones v. Gibbons* (b), are very direct on this point. He says, "he who has the estate has the debt," &c. And again he says, "it is difficult to say the mortgage passes and is well assigned to one person, and yet the debt remains in another. It is impossible that it can be so divided. Therefore, by the assignment of the mortgage, the debt necessarily passes as incident to it." The cases therefore as to mortgages cannot be well distinguished from the case of a judgment.

Nor is there any difficulty in adopting the rule for judgments, which has been adopted for mortgages: and it appears that requiring the conuzor to join in the assignment is the practice.

Speaking of mortgages, Lord Eldon says (c), "it was also supposed that in practice there is no occasion to make the mortgagor a party: but," he adds, "I have got all the information that I could, and I think I have got the best: the result is, that persons most conversant in conveyancing hold it extremely unfit, and very rash, and a very indifferent security, to take an assignment of a mortgage, without the privity of the mortgagor as to the sum really due; that in fact when better security cannot be got, it does happen that assignments of mortgages are taken, without calling upon the mortgagor, but that the most usual case where that occurs is where it is the best security that can be got for a debt not otherwise well secured." That observation is very applicable, I think, to the present case. Lord Eldon goes on to say, that such a case "is not in the course of transferring mortgages, but of raising money upon such securities: but no conveyancer of established practice would recommend it as a good title, to take an

(a) 4 Ves. 128.

(b) 9 Ves. 411.

(c) 4 Ves. 126.

"assignment of a mortgage without making the mortgagor a party, and  
"being satisfied that the money was really due." May, 1839.

Now these observations of Lord Eldon are very applicable to this case. The proceedings in the Master's office shew the dealings between Nolan, and Robert Gray, and Boyle and Co. Nolan was indebted to Robert Gray, and had assigned him several securities; Boyle and Co. were to get all those securities assigned, and several other securities; and all these, though not mentioned in the deed, were to be collateral securities. The deed is a general deed to get securities.

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But even if this were merely a case of payments *bona fide* made by the conuzor, *without notice* of the assignment, I do not see how I could, on principle, distinguish judgments from mortgages. It is said that it would be most inconvenient if the assignee were obliged to give notice. Greater inconvenience would ensue if the conuzor could not make any payments to the conuzee, without first making a search for assignments. The principle contended for by the counsel for Boyle and Co. would equally apply against paying interest as well as against paying off the principal. It would be a most extraordinary rule to establish, that the owner of the estate could not pay his own creditor, without first making inquiries, and not only that, but that after finding one assignment he must look for other assignments, and then he must ascertain priorities between the assignees. He could not do this without running the risk of delaying his own creditor. Other inconveniences might be apprehended, but it is not necessary to pursue that part of the subject; for here it is not necessary to decide the point on the general view of the statute, because this is a case where the conuzee had obtained a grant in custodiam of the conuzor's lands, and subsequently entered into a deed, by which he was to receive £2500 a year, until his demands were paid off, and the assignee is fastened with notice of these facts, while, on the other hand, the conuzor had no notice of the assignment.

The prayer of the original bill must be granted, and the cross bill dismissed, with costs.

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*Reg. Lib. fol. 401, June 26th, 1839.*

Declare that the plaintiff in the original and supplemental cause is entitled to credit against defendants, *Abraham Boyle, Francis Lowe, James Pim, Leonard Bickerstaff, and Jonathan Greenwood Pim*, for all monies paid by said plaintiff to defendant, Patrick Nolan, on account of the judgment of Michaelmas term, 1823, in the pleadings mentioned, and said last-mentioned defendants declining to take any reference or inquiries as to the sum due on the said last-mentioned judgment, or the judgment for the sum of £747 ls. 0d., debt, besides costs, obtained by



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Abraham Lane against the plaintiff in the original and supplemental causes, in the court of Exchequer in or as of Easter term, 1818, and both which said judgments are now legally vested, by assignment, in said Abraham Boyle, Francis Lowe, James Pim, Leonard Bickerstaff, and J. G. Pim,

Let said mentioned defendants, within one month from the date of this decree, enter satisfaction on the record of said judgments; and let the defendants, William Graham and William Deane (the assignees of Nolan the bankrupt), deliver upon oath, to the plaintiff in said original and supplemental causes, all receipts and vouchers for monies stated in the account in the pleadings mentioned, submitted to the arbitration of Gerrard Edward Strickland, and in the possession or power of the said last-mentioned defendants, and let the said defendants, Graham and Deane, assignees as aforesaid, within one month of this decree, enter satisfaction on the record of the several judgments against the plaintiff in the said original and supplemental causes in the pleadings mentioned, which were legally vested in the said Patrick Nolan when he became bankrupt, &c.

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*Cross-cause, Reg. Lib. 402.*

Let the plaintiffs' bill in the cross-cause be dismissed, with costs, as to the defendant, Daniel Henry Ferrall, therein named; and let the said defendant, Daniel Henry Ferrall, pay to the defendants, O'Connor and Veevers, and also the defendants, Stewart and Kincaid, their costs in cross-cause, &c.

## ROLLS.

*Wednesday, June 12th.*

## ATTACHMENT—NOTICE OF ORDER.

D'ARCY v. D'ARCY.

The defendant, an executor admitting assets in his hands to the amount of £2394. 18s., filed a charge under the decree to account in this cause, in April 1835, setting forth several demands which he alleged to be due to him out of the testator's estate, and claiming to be entitled to nearly the entire amount of the assets admitted, on foot of his demands. To that charge, a discharge was filed; but, after considerable delay, publication of the evidence in aid of the accounts passed, without any proof having been offered in support of the defendant's charge. In that state of facts, and before the Master had made his report, Richard Ham, a creditor having the carriage of the decree, applied to this court, on the 26th of April last, for an order that the defendant should bring in and lodge, to the credit of this cause, the assets of the testator, admitted to be in his hands. On that motion the defendant appeared, and shewed the court, that since he admitted the sum of £2394. 18s. to be in his hands, he had paid away the sum of £877, part of the before mentioned sum, in discharge of debts due by the testator's estate. At the same time, he insisted upon his right to retain the residue of the assets, on account of his demands, as stated in his charge filed under the decree. The court was then pleased to order, that within six weeks, from the date of the order, the defendant should, with the approbation of the Master, invest in Government new  $3\frac{1}{2}$  per cent. stock, the sum of £1517. 18s., being the residue of the assets, and transfer the same, with the privity of the Accountant General, to the credit of this cause.

Within the time limited by the foregoing order, the defendant applied for liberty to examine witnesses to prove his charge before mentioned, notwithstanding that publication of the evidence in aid of the accounts had passed. The court granted the application as to some of the items of demand stated in the charge, but refused it as to others; and ordered, that Richard Ham, the creditor having the carriage of the decree, should be at liberty to examine the defendant, on personal interrogatories, and to file a discharge, and examine witnesses to prove the same, if he should be so advised; and that the examination of witnesses should close within six weeks from the date of that order.

S H †

An order made in the presence of the party, on a motion on which he appeared by counsel, need not be served upon him to ground an attachment for non-compliance.

An executor admitting assets, and ordered to bring them in, cannot rely upon his own demands set forth in a charge under the decree, but not proved, as cause against the issuing of an attachment for non-compliance with the order: nor would the court extend the time for bringing in the money until after the Master should have made his report—there having already been unreasonable delay.

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Mr. *Christian*, for Richard Ham, now moved for an attachment against the defendant, for not complying with the order of the 26th of April last—the time limited having expired.

Mr. *James O'Brien*, for the defendant, came in at the same time on a cross-notice, and moved that the order of the 26th of April last might be varied, or stayed until the Master should have made his report. That order had not been served on the defendant; which, it was submitted, was a fatal objection to the application on the other side; as the non-service of the order was good cause against an attachment for not obeying it: *Anon. (a)*; *Mullins v. Williamson (b)*.—[MASTER OF THE ROLLS. The order of the 26th of April was pronounced upon a motion on which the defendant appeared. Should I have made it part of that order, that the defendant, in whose presence it was pronounced, should have notice of it? I think you will find a case in which a party having notice of an injunction order, was attached for breach of the injunction, though it was not served.]—In *Whitney v. Giles (c)*, the late Master of the Rolls said, that when a party has notice of an injunction order, and keeps out of the way, to avoid the service of it, “then, on account of the fraud,” he will be attached; but, as it did not appear in that case that the party had so kept out of the way, the attachment was refused. In the present case, it is not pretended that the defendant kept out of the way, to avoid the service of the order; nor that there would have been the least difficulty in serving it. So, in *Morris v. Morris (d)*, it was held, that an attachment should not be awarded for breach of an injunction, where the party might have been, but was not, served with it.

Mr. *Christian*, *contra*, cited *Dasilva v. Donegal (e)*, in which an objection similar to the present being made, was disallowed by Sir A. Harte. Also, in *Bambridge v. Castel (f)*, it was decided, that where an order is made upon hearing counsel of both sides, there is no occasion to serve it.

MASTER OF THE ROLLS.—I think that an order, made on a party after hearing his counsel, need not be served on him; and I desire it may be understood generally, that I shall follow the rule laid down by Sir A. Harte, in *Dasilva v. Donegal*.\*

(a) 3 Law Rec. 172.

(c) 1 Law Rec. N. S. 130.

(e) 3 Mol. 101.

(b) 2 Mol. 380.

(d) 1 Hog. 238.

(f) Mosley, 202.

\* It is scarcely possible to read attentively Sir A. Harte's judgment in *Dasilva v. Donegal*, as reported, without believing that some fatality has occurred to the report. As reported, the reasoning of the court is conclusive, and the decision is consistent with the reasoning; but between the reasoning and the decision, are *dicta* inconsistent with both; and the marginal note to the case is an abstract, not of the reasoning, nor of the decision, but of the *dicta*. The counsel who cited the case, naturally followed the

The defendant's counsel further submitted that, when the order of the 26th of April was pronounced, it appeared that publication of evidence, in aid of the accounts directed by the decree, had passed; and as the defendant's charge remained unproved, the court pronounced the order disregarding his demands. But the court had since been pleased to grant liberty to the defendant to prove his charge, notwithstanding publication having passed. The defendant's proofs were accordingly

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reporter, and merely read to the court the marginal note and the *dicta*; which, being received as the substance of the judgment, and agreeing with the opinion implied in his Honor's previous question—"Should I have made it part of the order that the defendant, in whose presence it was pronounced, should have notice of it?"—were admitted as an authority precisely in point. But the objections in that case were essentially different from the objection in this. Here, the objection was, that the order to pay had not been served at all, though there was nothing to prevent the service of it. There, an attested copy of the order had been personally served upon the defendant in London, and another copy left at his residence in Ireland; but, it was objected that the service was informal upon two grounds: first, because it was out of the jurisdiction; and second, because the order, being an order to pay money, had not been exemplified, *i. e.* "clothed in a piece of parchment with a piece of wax appended to it." As to the former objection, Sir A. Harte observed [p. 105] that although the court will not permit service of subpoena out of the jurisdiction, to bring in a defendant for the institution of a suit, *when once the party has appeared the case is different; that he had therefore held personal service "at Liverpool of the conditional decree, and of subpoena to perform the decree, to be good service."* The use of notice to a party is, that he may take steps to defend himself. If one cannot be personally served with such notice, the ordinary course is to serve it on his clerk in court, or by leaving it at his last abode. That mode of notice is well supplied, and the end accomplished, by personal service upon the party himself, although out of the jurisdiction. Here, notice to Lord Donegal being served personally in London, *his complaint, if any, must be that he has had a notice, that was a better notice than he was entitled to.* The invalidity of the first ground of objection having been thus clearly shewn, it would seem highly improbable *a priori*, that so able a Judge as Sir A. Harte, after securely establishing his position, would proceed to incumber it with other support at once questionable and unnecessary. Nor is the *a priori* improbability shaken by the fact, that in this case the needless aid, which Sir A. Harte is reported to have applied, is an authority which was pressed upon him on the motion—which he noticed in very equivocal terms of respect—and which his decision contradicts. "In *Ryder v. Kidder*,† Lord Erskine, whose authority is as good as any upon such points as these, held that where defendant is present in court, that removes the necessity of personal service."—If the only objection to be disposed of had been, that the service being out of the jurisdiction was informal, it would be possible, though unlikely, that Sir A. Harte after demonstrating that in the case before him, service out of the jurisdiction was good service, might have again advanced upon the demolished objection from a different point of attack, and thrown upon it, what he appears to have treated as, the infinitesimal weight of Lord Erskine's authority. But, as was said in the argument, if there was no obligation to serve the order, there could not be to exemplify it; yet, Sir A. Harte said, "Now, as to the other point,—is the instrument served in due form? The Master of the Rolls holds that non-compliance with the order is not sufficient to ground process, by reason of the non-exemplification; and although I originally should have said otherwise undoubtedly, yet if that is settled in *pari materia*, I shall conform." Accordingly the conditional order for a sequestration was discharged, upon the ground, that the defendant, though personally served with an attested copy of the order to pay, was not served "in due form" by reason of the non-exemplification.—Considering the reasoning and decision, the probability seems very strong, that Sir A. Harte noticed Lord Erskine's decision only because he was pressed with it by the counsel; and being pressed with it, he felt himself obliged to question its authority. But it is at least certain, that Sir A. Harte's decision distinctly overrules his reported *dicta*, and is the extreme opposite of the marginal note to the case. Possibly, the word "not" was omitted by the printer.

In the present case, the decision was pronounced under the impression, that it was "following the rule laid down by Sir A. Harte in *Dasilva v. Donegal*," to which, upon examination, it seems to be directly opposed. The reporter therefore believes it to be

• In *Nolan v. Nolan*, 1 Mol. 83.

† 12 Ves. 202.

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in forwardness, and the Master's report upon them would be obtained very soon. It was therefore hoped, that the court would either vary the order of the 26th of April, or stay it until the Master should have made his report: it might be inconvenient to the defendant to bring in, immediately, so large a sum as £1517. 18s.; and it would be hard to oblige him to do so, when it would probably appear, within a very short time, by the Master's report, that he was entitled to retain it.

not inconsistent with his humble duty to the court, to state as briefly as he can, the grounds upon which, as he thinks, the principle of this decision may be questioned.

That an order shall be obligatory upon a party, it is necessary that he shall have notice of it. The question is, what notice? If the order be pronounced after hearing his counsel, or in his actual presence, has he necessarily *that* notice which fixes the obligation? The reporter would respectfully submit that he has not.

It is very true, that the declared and known will of competent (*i. e.* perfect or complete) authority, creates an immediate obligation; but this, like almost every other general truth, needs to be examined, in order to prevent a fallacious application of it. The great variety of significations in which modern use employs the term "authority," unknown to the old *auctoritas*, have probably arisen, for the most part, if not altogether, from confused notions about the nature of authority properly so called. Locke mentions authority in the sense of precedent, or the influence of other men's decisions upon the formation of our own, as one of the largest and most prolific causes of error. We frequently hear the term indifferently applied to the various conditions in which mere right or mere power may exist. However, the dictionaries give, as its primary signification (in which it is here used), "legal power, majesty;" but, as it is conceived, neither nor both of these can be regarded as its full and proper meaning. Perhaps, if authority might be personified, it would be proper to say that, it is the *person* of which Majesty is the *presence*. It is a commanding will, having a right to command, and power to enforce what it commands: it exists in the inseparable union of these three—the will, the right, and the power, and cannot exist otherwise. As the will may sleep, so authority may be dormant or unexercised; but it is plain that until the will awakes to exercise its right and power, there can be no practical authority. Such being its nature, it must in its ordinary and natural state abide in a single person, or body of persons acting in unity; and in this state, as there can be no impediment to its action, there can be no delay of the obligation which it creates. In the case of military command, or the order which an employer issues to his servant, or a parent to his child, hesitation to obey would be refractory, and delay would be criminal disobedience: because, authority is complete in the person from whom the order issues: the will, the right, and the power, are united in one hand, the indication of which must be instantly obeyed. But such is not the artificial and unique condition of the authority which the civil court exercises when administering justice between parties litigant. Here, the right and the power, which in a state of nature should have belonged to the suitor, are vested in trust to be exercised by the court; but the will, which can be bound only by itself, of which a man cannot be divested, and without which there can be no exercise of either the right or the power, still remains with the suitor. It is therefore plain, in theory at least, that in the case under consideration (the administration of civil right, from which criminal jurisdiction is totally distinct) the order of the court needs the sanction and notification of the complainant's will to be obligatory.

The principle thus briefly stated, is in fact almost every day not only admitted but proclaimed by the court, in the most important provinces of its jurisdiction. For instance, the jurisdiction for the prevention of mischief and staying waste, is one which public policy requires to be most extensive, and unqualified; yet, where waste is being committed in a manner so destructive, and upon a scale so large, as to render it almost a public grievance, if the landlord chooses to permit the waste, the court neither has, nor can have, any authority to prevent it. Nay, so essential is the will of the suitor to the authority of the court, that if, when the landlord sues for an injunction to restrain the tenant, it appears that he has not brought to the court the active will which is essential to its authority—if, for example, his will to restrain the tenant be bound by its own previous agreement,—the court is powerless and cannot interfere. *Sherr v. Weir*, ante, 213: *Maxwell v. Mitchell*, ante, 369.

No doubt, the court possesses very large and independent powers for the protection and vindication of the authority which it exercises, and for punishing parties in contempt. The present question, however, is not concerned with those powers, but with the authority which precedes them, and with the state of facts necessary to constitute a

**MASTER OF THE ROLLS.** Here an executor, admitting assets, filed a charge so long ago as the year 1835, setting forth certain demands, and therefore claiming to be entitled to retain the assets admitted. Having neglected to prove his charge, and publication of the evidence in aid of the accounts having passed, the court, on the 26th of April last, ordered him to bring in the assets, within six weeks. He has since applied for leave to examine witnesses to prove his charge, notwithstanding publication having passed; and the court, putting him under terms of waiving certain demands, allowed him, within a limited time, to examine

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contempt. But, in passing, it may be well to observe, that a distinction seems to exist in principle, between the orders which the court issues of its own distinct and independent authority, *e. g.* attachment orders, and the decretal or interlocutory order which the court pronounces at the suit of A. against B., whereby B. is ordered to pay to A., or into court, &c., or to desist from wasting the tenement which he holds under A., and such like. The conditional order for an attachment, issuing from an authority perfect in the court, is like the military command, and creates, when known, an immediate obligation: therefore, the object of serving it, is exclusively to give the party notice of the fact that the court has pronounced it; and if it was pronounced in his presence, it would seem that the service of it would be unnecessary. On the other hand, the injunction order, or order to pay, &c., pronounced at the suit of A. against B., is obligatory by an authority not perfect without A.'s will: therefore, as it is conceived, though pronounced in B.'s presence, it should, to be obligatory, be regularly served by A. upon B.; as B. should have notice not only that the court has pronounced the order, but also that A. wills it.

Perhaps some persons, while admitting the general principle, might argue that inasmuch as the order in question is pronounced upon the application of the suitor, and in the presence of the party ordered, the latter must thereby reasonably have all the notice requisite; and therefore that service of the order would be unnecessary. To such reasoning, there seem to be two insuperable objections. First, it leads to a conclusion, which can afford no general rule, but would keep the practice unsettled: for, it generally appears, in cases in which any defence is attempted, that although the application may be reasonable in the main, it needs some, and frequently, very considerable modification; and the court orders, not what the applicant has asked, but what in equity he ought to have asked; *non constat*, that this is what he wills. Therefore the reasoning just adverted to, could properly apply only to such cases as in point of fact are comparatively rare, in which the court, after debate, pronounces an order in the terms of the application: for only such an order would possess internal evidence of the applicant's will. If it is said, that an order comprising the principal part of what is asked, would be conclusive, it is answered, *non sequitur*; and even if the reasoning should be admitted, it is plain that it would open an interminable controversy about the degree of variance between the order and the application, which would render service necessary. This, however, is considering the matter in its least important character, as a mere point of Chancery practice; but it is not to be forgotten that it is a point at which civil liberty may be interrupted. Secondly, even in the cases in which the court, after debate, pronounces an order in the terms of the application, it should be remembered that the will which is necessary to create the obligation, is also necessary to continue it. A man's will is not always uniform: it does not follow that he will act upon the order, because he has obtained it; on the contrary, it frequently appears upon further consideration, that it would not be advisable to put the order in force, and it lies as a dead letter in the office. The conclusion is therefore respectfully submitted, that the order, though pronounced in the actual or constructive presence of the party ordered, is not obligatory upon him, unless it be personally served; or, if he be not within the jurisdiction, unless the service be substituted.

The excepted case of a person aware of the order upon him, and keeping out of the way to avoid service of it, was said by Sir William M'Mahon, in *Witney v. Giles* (cited in the text), to be out of the general rule, *by reason of the fraud*. Whether the keeping out of the way to avoid the service of an order be fraud, it is not here material to inquire; for, independently of that consideration, it is plain that service of the order would, in such a case, be unnecessary; as the fact of *keeping out of the way to avoid the service of an order*, is evidence that the party ordered has all the notice he is entitled to, *i. e.*, that he knows the court has pronounced the order, and that the party by whom it was obtained wills it to be enforced.

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witnesses as to others. He now wants me to try on motion the right to be proved before the Master; and to allow as proved what as yet is only claimed;—that so, he may avoid an attachment for not complying with the order to bring in the fund. I will not do it. When he shall have proved his demands, it will be time enough to consider them as cause against an attachment. However, under the circumstances, I will extend the time a little, for bringing in the money, and facilitate the defendant as far as I can, without interfering with the principle of the former order.

Order.—Let the defendant, in execution of the said order of the 26th of April, 1839, within one fortnight from the date of this order, invest the sum of £517. 18s. in Government new  $3\frac{1}{2}$  per cent. stock, &c., and transfer the same to the credit of this cause, &c. &c.; and let him, within one month, enter into and enrol a recognizance, with two solvent sureties to be approved by the Master—to whom it is hereby referred to approve of same—conditioned to pay, on or before the 10th of November next, £1000, being the residue of the sum of £1517. 18s., ordered, by said order of 26th April, 1839, to be invested and transferred to the credit of this cause; or, if he shall so prefer it, let him invest in new Government  $3\frac{1}{2}$  per cent. stock, and transfer to the credit of this cause, the said sum of £1000, within one month from the date of this order; and in case the said defendant shall not comply with the terms of this order, let an attachment issue against him, without further order; and let him pay to Richard Ham, the creditor having the carriage of the decree, the costs of this motion.

*Friday, June 7th.*

## RECEIVER—SECURITY.

BAILIE v. BAILIE.

The Master having reported the former receiver in default, the court removed him; appointed another person as receiver in his stead; and ordered the recognizance of his sureties to be put in suit. That order having been executed, the Remembrancer of the court of Exchequer, upon a reference to him, reported the amount due on foot of the recognizance to the receiver in this cause; but, before the sum so reported was received, the receiver died. In the mean time, nearly all the demands in this cause were disposed of, and there was no further occasion for a receiver, except to receive and bring in the sum reported in the Exchequer cause. For that purpose, on the 13th of February last, the court referred the Master to report a fit and proper person to be receiver; and under that order, the Master reported that Mr. Uniacke would be a fit and proper person.

The court will not in any case appoint a receiver upon his own security only.

Mr. *Saunders* now moved, that a consent signed by all the parties, including the inheritor, that Mr. Uniacke should be appointed as receiver, on his own recognizance merely, might be made a rule of court.

MASTER OF THE ROLLS.—If parties would settle their differences, or manage their property, out of court, they might appoint their own agents as they please; but if this court is required to interfere, its rules must be complied with. However suitors may think proper to agree amongst themselves, the court will not agree to waive the security of its proceedings; nor to have the reputation of the frauds and mischances incident to arrangements made in opposition to its settled rules. The receiver of a court of Equity ought not to be appointed without sufficient sureties: for, when the summary jurisdiction of the court cannot persuade him, his own recognizance is not likely to be a very available security. Every day's experience shews the necessity of the rule. Therefore, though the inheritor consents to compromise the security of his estate, I will not consent to a pretence for saying, that an estate in custody of this court is insecure; or, that funds attached for equitable distribution were lost. Perhaps, the probability is very strong that, no inconvenience would arise in this case from the want of sureties; but the court will not speculate upon chances, nor be satisfied with probabilities, where funds to be received by its authority are concerned. The receiver must give an effectual security; which shall not be dependent upon the accidents of one man's character or circumstances; nor be



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dispensed with though the parties interested consent to the risk.

Refuse this motion: the court declaring that a receiver of this court ought not to be appointed upon his own recognizance merely.

Monday, July 1st.

### TAKING AFFIDAVIT OFF THE FILE, TO PROSECUTE FOR PERJURY.

NAPIER v. NAPIER and others.

When a party applying to take an affidavit or pleading off the file, to prosecute for perjury, positively swears that he will prosecute, his Honor, M. R., deems that it is *ex debito justitiæ* to grant the application, without considering the merits of the question to be tried, which should go to the jury unprejudiced by any intimation of the opinion of this court.

Mr. FITZGIBBON, for the defendant W. Napier, moved that certain answers and affidavits sworn and filed in this cause, by the defendant J. D., and also the answers and affidavits of certain other defendants, might be taken off the file of this court, and handed over by the respective officers, having charge thereof, to the Clerk of the Crown for the county of Antrim, in order to send up bills of indictment and prosecute, at the next assizes in and for the said county, the defendant J. D., for wilful and corrupt perjury, contained in his several answers and affidavits.—Counsel was proceeding to state the facts, when he was stopped by the court, and asked, whether his client had sworn to prosecute? That question having been answered in the affirmative, his HONOR said he would not enter into the merits of the question to be tried; and that the granting of the application was of course.

Mr. Warren, Q. C., and Mr. Whiteside, for the defendant J. D., said they were ready to resist the application, upon the merits; and that it ought not to be granted, unless upon a strong *prima facie* case. They referred to the very recent similar application in *Daly v. Toole*, which, having been moved before this court, was referred to the Lord Chancellor, who refused the application, upon the merits.\* The interests of parties in this court may be seriously prejudiced, if applications like the present are to be granted as of course: the cause may be infinitely delayed, and discredit may be thrown upon the testimony of the most respectable witnesses. It is not in every case of malicious prosecution, that evidence is available for the redress of the injured person; and whatever be the result or character of a prosecution, it cannot tend to a man's credit or respectability to have it said of him—"he was prosecuted for perjury;"—his feelings are likely to be hurt, and his reputation to be damaged. It is therefore submitted, that this court ought not to afford any facility for such a proceeding, without inquiring whether or not there is probable cause for it.

\* See the case *ante*, p. 344.

MASTER OF THE ROLLS.—As the defendant swears that he will prosecute, I think it is *ex debito justitiæ* to grant his application. With the merits of the case, and the question of probable cause, I have nothing to do, and will not meddle. It is the right of the subject to institute a prosecution when he will; and the law casts upon the exercise of that right a very serious responsibility. In my opinion, this court should neither stand in the way of that right, nor, by becoming a party, reduce or limit its responsibility. I cannot give, in a case of this kind, more protection than the law gives; and I will not—as I think I ought not—prejudice a case to be tried before another tribunal, nor prejudice the question to go to the jury, by any intimation of my opinion.

In the court of Exchequer, I am aware, it is usual not to grant such an application as this, until, in the opinion of the court, a *prima facie* case for a prosecution has been shewn; and it seems that, in the case referred to by Mr. *Warren*, the Lord Chancellor adopted the Exchequer practice. As to that application, I must observe, that I sent it to the Chancellor, not because I had the least doubt as to the order I should have made on it; but, when before me, it appeared that the cause had been set down in the Lord Chancellor's list, and would be heard in a day or two: I therefore sent the application to his Lordship, by whom, after the hearing of the cause, it was, perhaps unavoidably, considered upon the merits, and refused. The Lord Chancellor approves of the rule in the Exchequer; but my own conviction upon this subject is so very strong, that until my order is appealed against and expressly overruled, I shall feel it to be my duty to grant, as of course, every application of this kind, when the applicant swears that he will prosecute.

Motion granted.

Mr. *Warren* intimated that his client would appeal against this order.

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NOTE. Within a few days after the foregoing order, the application in *Daly v. Toole*, was renewed in this court; and his HONOR said, that he would have granted it as of course, according to the rule laid down by him in the foregoing case, if it was then made for the first time; but as it had been already heard and refused by the Lord Chancellor, he should as of course, refuse it with costs.

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*Friday, July 5th.*

### SUBSTITUTION OF SERVICE.

**SOMERS v. CONNOLLY and others.**

Service of *subpoena* substituted on the general agent of defendant, resident abroad, but where was unknown; though it did not appear that he was secreted or withdrawn to avoid being served.

Mr. JAMES PLUNKET moved, on behalf of the plaintiff, that service of the *subpoena* to appear and answer, upon the general agent of the defendant Connolly, might be deemed good service of the defendant, pursuant to the 4 & 5 W. 4, c. 82.

The affidavit of the plaintiff's solicitor, on which the present application was grounded, stated, on the deponent's information and belief, that the defendant was and had been for many years in embarrassed circumstances, and was therefore permanently resident out of Ireland, to avoid his creditors, and prevent their learning his place of abode. That deponent had caused diligent inquiries to be made, respecting the defendant's residence, and heard and believed that the defendant had been for several years moving about from place to place on the Continent; that he had been for some time resident in Paris, but had since removed, whither deponent was unable to ascertain. That deponent heard and verily believed that the defendant, some years ago, executed a general power of attorney to Mr. R. C., of, &c., to act for him the said defendant, and manage his affairs in Ireland; and that the said Mr. R. C. had ever since been the agent and general manager of the defendant's affairs in Ireland; and that any *subpoena* served on the said Mr. R. C., for the defendant, would reach the defendant.

After stating the affidavit, counsel said it had been decided,\* that the statute applies where the defendant's residence cannot be ascertained, although it does not appear that he is keeping out of the way to avoid the service of process.

MASTER OF THE ROLLS.—I know it has been so decided; and I would therefore give you an absolute order at once, but that your affidavit is merely on information and belief.

Take a conditional order.

\* By the court of Exchequer, in the cases of *Lovell v. D'Este*, 1 Jones, 561; and *Callaghan v. Pepper*, 2 Jones, 46.

*Monday, July 8th.*

**COSTS OF BRINGING PUISNE JUDGMENT CREDITORS  
BEFORE THE COURT—SUPPLEMENTAL BILL—  
DECREE ON BILL TAKEN *PRO CONFESSO*.**

**BARRETT and wife v. BIRMINGHAM and others.**

**BARRETT and wife v. MAHON and others.**

This was a supplemental suit, instituted to bring certain puisne judgment creditors before the court, for the purpose of clearing the title to the lands sold under the decree in the original cause. It now came on to be heard upon bill and answer as to the defendant Mahon, and an order to take the bill *pro confesso* as to the others.

The supplemental bill stated, that the original bill was filed to raise the amount of certain sums charged in, and prior to, the year 1784, upon the lands in the pleadings mentioned; and that the cause was heard upon report and merits, in June 1832, when there was the usual final decree for a sale. That several supplemental proceedings having become necessary, in consequence of the insolvency of the inheritor, and the death of parties, the sale under the decree did not take place until the 1st of August, 1837; when the lands were sold to several purchasers for the aggregate sum of £4346, which was considerably less than the amount of the sums decreed. That the title to the lands having been approved, subject to the usual searches, it was found that several judgments against the inheritor, long puisne to the demands decreed, were unsatisfied upon record—and, among others, a judgment obtained in Trinity 1816, for the sum of £499, and subsequently assigned to the defendants R. Boyd and Charles O'Malley; a judgment obtained by the defendant C. O'Malley, in Michaelmas 1826, for the sum of £109; a judgment obtained by the defendant J. Bermingham, in Trinity 1818, for the sum of £1000; a judgment obtained by the defendant Ulick Waldron, in Trinity 1826, for £132; a judgment obtained in Michaelmas 1812, for £564. 4s. 10d., by one J. Barry, and subsequently assigned to the defendant N. Mahon. That the purchasers having assigned the existence of these judgments as objections to the title, the plaintiffs, in order to save expense, caused to be served on the several puisne judgment creditors, except U. Waldron, whose residence could not be discovered, notices in writing, requiring them respectively to state to the plaintiffs, or their solicitor, by notice in writing, whether they were willing to satisfy the said judgments, so vested in them respectively as aforesaid, at the cost and expense of the party or parties requiring same; or at the like costs to release, &c.; or

Where several puisne judgment creditors were made defendants by supplemental bill, that their several demands might be bound by the decree; and the bill stated, that one of them was out of the jurisdiction, and that his residence could not be ascertained; and it appeared at the hearing, that he had not been served with process:—the court declined to make any decree as to the absent defendant, but held that his presence was not necessary at the hearing; as the several defendants stood in distinct rights, so that the decree as to one would not affect the rights of the others.

Where the bill is to be taken *pro confesso*, the court hears the pleadings, and itself pronounces the decree: therefore, when it appeared that the suit had become necessary, by

the unreasonable refusal of the defendants to comply with a plainly equitable request, the court decreed *inter alia* that they should pay the costs of the suit.

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to join in the conveyance to the purchaser, upon having reasonable and proper evidence adduced to them respectively of the existence of the prior incumbrances, and the insufficiency of the funds to meet the same; or whether it would be necessary to file a supplemental bill, &c. &c.; and giving them notice, that in the event of their refusing either to satisfy the judgment or release the lands, or to join in conveyance to the purchasers, the notice would be used to oppose the allowance of their costs in the supplemental suit, and to charge them with the costs to be incurred by the plaintiffs.\* That several of the judgment creditors, on whom the said notice was served, had, in compliance therewith, signified their willingness to release the said lands from all demands in respect of the judgments vested in them; but that the said N. Mahon, assignee, &c., the said Charles O'Malley and Robert Boyd, assignees, &c., the said Charles O'Malley, and the said J. Birmingham had wholly neglected and refused to comply with plaintiffs' said notice, whereby plaintiffs were greatly delayed in the prosecution of the said original cause.—Prayer of bill:—That the said decrees might be carried into execution as against the said defendants; and that the said defendants might be restrained from ever proceeding at law or in equity against the said lands, for the recovery of their said several demands.

The defendant Mahon, by his answer admitted the service of the notice upon him, &c. &c., but stated that he was advised that, inasmuch as he became assignee of the judgment before mentioned, for full and valuable

*\* As the form of the notice in this case may be valuable in practice, the copy of it served on the defendant N. Mahon is here printed at length:—*

#### CHANCERY.

John Barrett and wife  
v.  
Thomas L. Birmingham and others.

WHEREAS in or as of Michaelmas term, 1812, one James Barry obtained a judgment, in her Majesty's court of Common Pleas in Ireland, against Thomas Lynch Birmingham, of Ashgrove, in the county of Galway, esq., for the sum of £564. 4s. 10d., late currency, and the said judgment, and all benefit and advantage to be derived therefrom, was subsequently assigned to and became vested in you. And Whereas at the time the said judgment was obtained, or at some period subsequent thereto, the said Thomas Lynch Birmingham was or became seized of or otherwise well entitled to an estate, for the term of his natural life, of and in all that and those the lands of, &c. And Whereas the said lands and premises are subject to various charges and incumbrances long prior to the said judgment so obtained by the said James Barry as aforesaid; and a bill hath been filed in her Majesty's high court of Chancery in Ireland, by John Barrett and Marcella his wife, two of such prior incumbrancers, for the purpose of raising the amount of their claim, by a sale of the said hereditaments and premises. And Whereas in pursuance of a decree for that purpose, the said lands and premises were sold by public auction, on or about the first day of August last, producing in the whole the sum of £4346, sterling. And Whereas the proceeds of the said sale will be wholly insufficient to pay and satisfy the various charges on the said hereditaments, which are long prior to the said judgment so obtained by the said James Barry as aforesaid. Nevertheless it is alleged by or on behalf of the purchasers of the said several hereditaments and premises, that such judgment (if still legally subsisting) is at law a lien on the said hereditaments and premises; and the said purchasers have required to be effectually protected against any proceedings which you, or any person claiming under you, may think fit to institute against the said lands, on foot of the said judgment: in consequence

consideration, he ought not to be called upon to satisfy the same, or to release the said lands and premises, &c., or to join in conveyance to the purchaser, unless by the direction or under the decree or order of this honorable court.

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Mr. *W. Brooke*, Q. C., for the plaintiffs, now stated their case, and referred to *Averell v. Wade (a)*. He submitted that this was idle and vexatious litigation on the part of the defendants; and that they should pay the costs of it.

Mr. *D. Sherlock*, for the defendant Mahon, submitted that the judgment vested in him was a valid charge; that he could not safely release the lands without either an order of the court or the consent of the inheritor; and that the inheritor was out of the jurisdiction.

Wednesday, July 10th.

The MASTER OF THE ROLLS, after recapitulating the contents of the pleadings already stated, delivered the following judgment:—

One of the defendants, Ulick Waldron, it appears has not been served with process, nor with the notice set forth in the bill. His presence, how-

(a) 1 Sausse & Sc.

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whereof, unless the said judgment hath become extinct, by reason of no interest having been paid thereon within twenty years, it will be necessary to file a supplemental bill against you, in order that you may be directed, by the decree of the said court, to release the said lands and premises of and from said judgment, or to join in the conveyance to the said purchasers. Now, inasmuch as the funds are inadequate to meet the several incumbrances prior to your said judgment, and for the purpose of saving unnecessary expense, this is to require you, within four days from the date hereof, to state to me, as the solicitor for the plaintiffs in this cause, by notice in writing, whether any payment hath been made to you, or to the said James Barry, on account of interest upon the said judgment, within twenty years last past, and on what day. And in case any such payment shall have been made as aforesaid, whereby the said judgment may be considered as subsisting, to state further—whether you are willing to satisfy the said judgment, at the cost and expense of the party or parties requiring the same; or otherwise, at the like cost and expense, to release the said several hereditaments and premises of and from all claims in respect of the said judgment; or, to join in the conveyance to the purchasers under the decree, upon having reasonable and proper evidence adduced to you, of the existence of such prior incumbrances as herein before mentioned, and the insufficiency of the funds to meet the same; and upon payment to you of all costs and expense attending the same, which I hereby on the part of the plaintiffs undertake shall be paid you. Or whether it will be necessary to file a supplemental bill against you, in order to obtain the decree of the said court in relation to the matters aforesaid. And take notice, that in the event of your refusing to satisfy the said judgment, if subsisting, or to release the said lands and premises therefrom as aforesaid, or to join in the said conveyance according to the terms aforesaid, this notice will be used, in such manner as I may be advised, for the purpose of opposing the allowance of your costs, as a defendant to the said supplemental bill, out of the funds in this cause, and for the purpose of making you responsible for the costs to be incurred by the plaintiffs in such supplemental suit.

Dated this, &c.

To Nichs. Mahon, esq.

Signed, ————,  
Plaintiff's solicitor.

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ever, is not necessary; as from the nature of the case and the construction of this record, the several defendants stand upon totally distinct grounds, so that the decree as to one need not affect the rights of the others.

The plaintiffs, as of course, are entitled to the decree; and the only serious question I have at present to decide is this,—by whom shall the costs of this suit be borne? The bill does not pray costs; but it states the notice served upon the several defendants; and that they were thereby severally apprised, that if, by their non-compliance, the supplemental suit should become necessary, the notice should be used to oppose the allowance of their costs as defendants, and to charge them with the costs incurred by the plaintiffs: therefore, the question as to the costs is sufficiently raised for adjudication. However, a difficulty of another kind at first seemed to stand in the way; as several of the defendants have allowed the bill to be taken *pro confesso*, and the question arose to my mind—whether, as to them, the court should go into the merits; or decline to do so, and let the plaintiffs frame such decree as they might be advised, as upon sequestration. But the cases of *Geary v. Sheridan* (a) and ——— v. ———,\* are authorities which shew distinctly that the practice as to a decree upon a bill taken as confessed, is different from the practice in the case of a decree upon sequestration;—that where the bill is to be taken *pro confesso* the court hears the pleadings; opens the whole case; and itself pronounces the decree; and does not permit the party to draw up his own decree.

The question then is,—should the defendants in this case have their costs, or pay the plaintiffs' costs? Without doubt, they have rendered this suit unavoidable: for, according to the doctrine recognized in the case of *Piers v. Piers* (b), the purchaser under the decree in the original cause had a right to object to the title, so long as any puisne judgment affecting the lands sold, and not bound by the decree, appeared unsatisfied upon record; unless the judgment creditor would either release the lands, or join in the conveyance of them. Accordingly, when in this case the several puisne judgments were discovered, and the purchaser thereupon objected, the plaintiffs, having carriage of the decree in the original cause, very properly served notices on the persons in whom the puisne judgments were severally vested, calling upon them to do either of three things: either to satisfy their judgments; or to release the lands; or to join in the conveyance to the purchaser,—upon the terms of the plaintiffs paying the costs of their so doing, and satisfying them as to the insufficiency of the fund realised by the sale of the whole estate, to pay the prior incumbrances. If the present defendants ob-

(a) 8 Ves. 192.

(b) 6 Law Rec. N. S. 108.

\* NOTE.—His Honor mentioned a second case, which the Reporter took down as *Molesworth v. Lord Bingham*; but he presumes he heard the name inaccurately, as he has not been able to find such a title in any of the Indexes.

jected to the accounts taken in the original cause, and desired to bring their objection before the court, there might be some reason for their refusing to comply, and leaving the plaintiffs to file their supplemental bill. But as no such objection appears, I must take it that the defendants' resistance to the application, by which they were apprised of the insufficiency of the fund to pay prior incumbrances, was vexatious and unreasonable; and I think I should not be doing full justice in the case, if I did not make them pay the costs of the litigation, which they have thus rendered unavoidable. It would be monstrous if puisne judgment creditors, by such inequitable resistance, should have it in their power to waste a fund already insufficient for the discharge of paramount demands.

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Decree that the defendants N. Mahon, Charles O'Malley, senior, Charles O'Malley, junior, John Bermingham, and Robt. Boyd shall execute such conveyance or conveyances as the Master shall approve of, releasing the lands sold, or which shall be hereafter sold, under the decree in the original suit in the pleadings in this cause mentioned; and that the said defendants respectively shall pay to the plaintiffs one-fifth part of the costs of this suit, when taxed by the Master. Declare that the court declines to make any decree against Ulick Waldron in bill named, and thereby stated to be out of the jurisdiction of this court, it appearing that process has not been served upon him in this cause.

*Monday, July 22d.*

**SECURITY FOR COSTS, PLAINTIFF OUT OF THE  
JURISDICTION—REFERENCE FOR SCANDAL.**

EVERARD v. ———.

Mr. DEERING, Q. C., for the defendants, moved that the proceedings in this cause should be stayed, until the plaintiff, who was resident out of the jurisdiction, should give security for costs. The notice of this application referred to the bill and other documents, by which it appeared that the plaintiff was an officer in her Majesty's service, and on duty with his regiment in India.

Application that the plaintiff, out of the jurisdiction, being an officer in H. M. service, on duty with his regiment in India, should give security for costs, refused with costs.

Limitation of the time within which a pleading should be referred for impertinence and prolixity, under the 61st Rule (Nov. 1834), does not extend to objections for scandal; as to which the court will extend the time as much as possible.

The statement in a bill, of facts relevant and material to the equity of the case stated, and the relief prayed, is not to be deemed scandalous; though it be such as the defendant whom it concerns should not be obliged to answer.



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**MASTER OF THE ROLLS.**—It is a settled rule, that an officer in her Majesty's service, and on duty with his regiment abroad, shall not be obliged to give security for costs, as an ordinary plaintiff, who of his own pleasure chooses to reside out of the jurisdiction. This application must be refused, with costs.\*

Mr. *Deering* said he had another application to make in this cause, on behalf of the same defendants, viz.—that they might be at liberty to serve a notice, and to file objections for impertinence and scandal, to certain parts of the plaintiff's bill specified in the notice; notwithstanding that the objection had not been taken within the time limited by the 61st General Order of November 1834.—[**MASTER OF THE ROLLS.** A distinction has been taken, I think very properly, between objections for impertinence or prolixity, and objections for scandal;† as to the latter, the court will extend as far as possible the time for a reference. It should be never too late to refer a pleading for scandal; as the records should be kept pure. Has counsel certified that the passages of the bill, specified in the notice of this application, are scandalous?—Yes: and there can be little doubt that the passages specified are grossly scandalous; as they charge one of the defendants, a respectable lady, with having lived for several years in improper intercourse; and having had an illegitimate child, the offspring of such intercourse; and having thereby obtained unbounded influence over the mind of the late owner of the estate, which is the subject of the present litigation. Even if true, such statements would be a needless exposure, and therefore scandalous: *Coffin v. Cooper* (a). They are so objectionable that they should not be read aloud in open court; but they are accurately marked on the attested copy of the bill, which is now handed up to the court.

Messrs. *Collins*, Q.C., and *Monahan*, contra.—The plaintiff, by his counsel, waives all technical objections to the present application, which he

(a) 6 Ves. 514.

\* The like exemption seems to apply to all persons resident abroad in the service of the Crown, whether civil or military: *Stanley v. Hume*, 1 Hog. 12; *Colebrook v. Jones*, 2 Dick. 154. But it must appear that the party is on actual service abroad, and not merely that he holds the commission: *Lillie v. Lillie*, 2 Myl. & Kee. 404.

† See *Pellew v. —*, 6 Ves. 456; 2 Ves. sen., 631; and *Coffin*

*v. Cooper*, above cited. It would seem that there can be no waiver of an objection for scandal; as it is an objection to the records of the court, respecting which the court will receive information from any person affected by it, and at any time. In *Coffin v. Cooper*, Lord Eldon said, "*he would not lay it down, that a person not a party to the record might not apply.*" But see *Anon.* 4 Mad. 252.

resists solely upon the merits. The passages objected to are now before the court, and therefore the question respecting them may be disposed of at once. According to the principles laid down by Lord Eldon in *Coffin v. Cooper* (a), the question here is, are the facts stated in the objected passages relevant to the plaintiff's case? if they are not relevant, it is admitted that the statement of them is scandalous; but if they are material or relevant, the statement of them is not scandalous. *Fenhoulet v. Passavant* (b); *Lord St. John v. Lady St. John* (c); *Anon.* (d).

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The plaintiff's case, as stated in his bill, is that, being entitled to a paramount charge upon the estate of R. Everard, for the sum of £1500, in the year 1835, he was, under the circumstances of fraud and coercion particularly stated in the bill, obliged by the said R. Everard to execute a release of the said charge, and to accept, in lieu thereof, the personal security of the said R. Everard, by bond with warrant for confessing judgment thereon, conditioned for the payment of the sum of £1000. That at the date of the release, and of the bond and warrant, the plaintiff, being a very young man, just entering the army, had no experience in legal transactions, and signed the release without any professional assistance or advice. That the said R. Everard previously stated, in the presence of several persons, that he had done no act to charge or encumber the estate; and that the exchange of securities was intended solely for the plaintiff's advantage. "*That in the year 1820 an improper intercourse commenced between the said R. Everard and the female defendant, which continued till his death, in 1836, and that there is issue of the said improper intercourse one son. That by reason of such improper intercourse, the said female defendant acquired unbounded influence over the said R. Everard;*"\* so much so, that on or about the 6th of January, 1829, the said R. Everard executed a certain indenture, purporting to be made between himself, of the first part, and a trustee and the female defendant of the second part, whereby, after reciting that he was seized in his demesne as of fee, in the lands in the pleadings mentioned; and that the said female defendant had handed over and vested in the said R. Everard, as her trustee, certain Government debentures and sums of money of her own separate property, to the amount of £3500, late currency; and that the said R. Everard stood indebted to her in the said sum, &c. &c.; and that to secure the payment thereof, with interest at four per cent., he had agreed to charge the same upon the said several lands: the deed witnessed, that in consideration of the said £3500, thereby acknowledged to have been received, &c. &c., the said R. Everard did thereby covenant with the said trustee, and his heirs, that the said sum of £3500 should be a lien on all the said lands, as

(a) 6 Ves. 514.

(b) 2 Ves. sen. 24.

(c) 11 Ves. 526.

(d) 1 Myl. & Cr. 78.

\* One of the passages objected to. There were several others, to nearly the same effect.

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*v.*

fully as if the same were conveyed to the said trustee in mortgage; and that the said R. Everard, and his heirs, should stand seized of the said lands to the use of the said trustee and his heirs, to secure the said sum, with interest as aforesaid; and that the said R. Everard should pay the said sum, with interest, to the said female defendant, within three months after demand; and that upon payment thereof, the said deed, and bond collateral therewith, should thenceforth be null and void; and that the said deed, and bond collateral, were executed to the said trustee for the separate and exclusive use of the said female defendant, &c. &c. The bill further states, that the said female defendant alleges, that after the execution of the said deed, she made several further advances to the said R. Everard, the receipts of which were regularly indorsed upon the back of the said deed, in the hand-writing of the said R. Everard; and also a declaration that the said deed should stand as a security for the said additional sums, with interest thereon in like manner as for the sum with interest therein mentioned, amounting altogether to £4538. That although the said deed purports to be in consideration of the said several sums mentioned therein, and indorsed thereupon, there was, in truth, no pecuniary consideration for the said deed, nor did the said R. Everard ever give up the said deed to either the said female defendant or her trustee, but retained possession thereof during his life; and that the same was found after his decease, which took place in the year 1836, in an old travelling bag which had belonged to him. That after the decease of the said R. Everard, the said female defendant stated to the several persons in the bill particularly mentioned, that she was not aware of the execution of the said deed, until after the decease of the said R. Everard, and that same was found after his decease in his travelling bag. That in February, 1837, the said female defendant, and her trustee named in the above-mentioned deed, filed their bill in this honorable court against the heir-at-law of the said R. Everard and several others, and thereby charged the due execution of the said deed and of the several indorsements thereon, and alleged that there was due thereon, at the time of the decease of the said R. Everard, the principal sum of £4538, and a considerable arrear of interest; and prayed that an account might be taken of the sums due on foot thereof, and that the same might be raised by sale of the estates. That the female defendant and her trustee, proved in their cause, the release aforesaid, executed by the plaintiff in this cause, in order to prevent the plaintiff from claiming under the decree in that cause on foot of his paramount charge upon the estate. That the estate is insufficient to pay both demands, and therefore that if the plaintiff loses his priority, his demand must be defeated. Accordingly, the plaintiff, by his bill, prayed that the release so executed by him might be set aside, as fraudulent and void, and as having been obtained from him by fraud, undue influence,

and misrepresentation. That notwithstanding the execution thereof, plaintiff might be decreed entitled to the sum due on foot of the original charge; and that an account may be taken of same, &c.; and that the same might be decreed well charged upon the lands and premises, &c. &c.; and that a competent part might be sold to pay the same; and for an account of the personal estate of R. Everard; and that the parties in the cause so instituted by the female defendant, and her trustee, might be restrained by the injunction of this honorable court, from distributing any fund that might be realised in said suit, until the plaintiff's rights in this suit shall have been ascertained.

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It is a material part of the plaintiff's case, to shew that the deed under which the defendant claims is a voluntary deed; and it was necessary to state the facts and circumstances by which the nature of that deed might more clearly appear. He has done no more than this, in the objected passages, which are plainly relevant and material to his case. If the defendant, by her counsel, will now consent to admit the deed under which she claims to be a voluntary deed, and to contest the plaintiff's right, simply as the representative of R. Everard, the plaintiff will at once consent to expunge all the objected passages. But if the defendant insists upon her title as purchaser for valuable consideration, and that by reason of the release executed by the plaintiff, her demand is prior to his; the plaintiff must be prepared to shew that the deed under which the defendant claims was without consideration; and he must have upon record a sufficient statement of the case upon which he must rely at the hearing of the cause.

Mr. Deering, in reply.—The defendant, it is true, insists upon her title as purchaser for valuable consideration; but the bill does not impeach the deed under which the defendant claims, nor pray that it may be set aside. It is therefore submitted that the scandalous charges which the defendant complains of, are not material to the case made by the plaintiff's bill. There could scarcely be a more offensive or injurious attack upon private character, than the passages in question; and they are irrelevant and scandalous. Even if the statements complained of should not be considered as absolutely irrelevant, they are several times repeated in nearly the same words; and go into a needless detail about the alleged offspring of the alleged improper intercourse. They are therefore at least prolix; and upon this ground alone, especially as the statements are hurtful to private character, the court would grant the present application. *Clougher v. Houston*(a); *M'Comb v. Armstrong*(b).

(a) 6 Law Rec. 349.

(b) 2 Mol. 309.

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v.

Wednesday, July 10th.

The MASTER OF THE ROLLS, after fully stating the contents of the bill, delivered the following judgment:—

The question in this case is, whether the statements in the plaintiff's bill, of which the defendant complains, are relevant to the case made by the bill and the relief prayed for, however offensive or injurious to private character they may be, and though they may be such as the defendant would not be obliged to answer, yet, if the alleged facts be relevant to the plaintiff's case, the disclosure of them cannot properly be deemed scandalous. As was said by Lord Eldon, in *Ex parte Simpson* (a) "if that which is stated is material to the issue, it may be false but cannot be scandalous. If relevant, it is not impertinent; and though scandalous in its nature, if relevant and pertinent, it cannot be treated as scandalous; and if false, it must be dealt with in another way." If the administration of equity between the parties, involves the consideration of a particular state of facts, the disclosure of such facts is relevant, though it may not be an indispensable link in the statement of the case. In the case of *Lord St. John v. Lady St. John* (b), upon a question similar to the present, Lord Eldon said, "It is to be lamented that all this conduct is brought upon the record; but the suit involves the consideration, not only, whether the deed is void, but whether this court is to do nothing with reference to the conduct of the parties. The questions and the nature of the suit being such, it is impossible to say, those parts of the answer which are contended to be irrelevant and scandalous are so. If relevant, whatever may be their nature, they are not scandalous. The matter, therefore, appearing upon this answer is not scandalous, as it is relevant; and it is not irrelevant, as it may have an influence upon the suit—attending to the nature of it."

In the present case, the court, when ascertaining the plaintiff's right, may probably have to consider the claim preferred by the defendant. Claiming as a purchaser for valuable consideration, she has instituted a suit to raise the amount of her demand off the estate of the late Richard Everard. It is stated, and not denied, that the estate will be insufficient to discharge, fully, the demands of both the plaintiff and the defendant; and that she has proved in her suit, the release, executed by the plaintiff in this cause, of the charge to which he was originally entitled; and which, if still in force, would have priority to her demand. The question as to priority, is of the utmost importance between the parties. The plaintiff states a case against the validity of the release, and prays that it may be set aside, as having been obtained by undue influence and misrepresentation; and that an account may be taken of the sums due to him on foot of the original charge. His demand would

(a) 15 Ves.

(b) 11 Ves. 539.

thus obtain priority to the demand of the defendant. But as he might not succeed upon that part of his case, he further insists that the deed upon which the defendant's claim is grounded, though professedly made in consideration of certain sums of money advanced by the defendant to Richard Everard, was, in truth, without any such consideration, and the result of the undue influence upon R. Everard's mind, in consequence of an improper intercourse then existing between R. Everard and the defendant: and so he makes the several statements respecting the alleged improper intercourse. He further states, that the deed was never given up by R. Everard; and that the defendant has stated to several persons, some of whom are mentioned in the bill, that she was not aware of the execution of it until after R. Everard's death; and that it was found, after his decease, in his travelling bag. All which the plaintiff charges to be the fact, and accordingly prays that the parties in the cause instituted by the defendant and her trustee, may be restrained by injunction, from distributing any of the funds which may be realised in that suit, until the plaintiff's rights in this suit shall have been ascertained.

The statements, just adverted to, cannot, I think, be reasonably quarrelled with, as being prolix; and, to use the language of Lord Eldon, in the case already mentioned, "it is impossible to say that those parts which are contended to be irrelevant and scandalous, are so. They are not irrelevant, as they may have an influence (and a very serious one) upon the suit—attending to the nature of it." The anonymous case in *Mylné & Craig's Reports* (a), which is very like the present, contains a similar decision of Lord Cottenham's. Another anonymous case (b) shews, that although the court will not expunge from the record what is relevant to the case made, the person whose character is affected is not under any necessity upon that account of enduring the libel, if libel it be: he, or she, may have his or her action at common law, as in the case of any other writing. I adopt entirely the principles of those decisions. I think the court should look very jealously upon statements injurious to private character; but it must take care that its regard for private character shall not exclude any statement of facts material to the equity of the case. Upon the present application, therefore, I must say

No rule.

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(a) 1 Myl & Cr. 78.

(b) 4 Mad. 252.

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ber, 1834, held, that where exceptions had been delivered, the answer could not be deemed sufficient until either the Master's report should be obtained disallowing the exceptions, or the three weeks within which the report should have been obtained, had expired; and, therefore, refused the motion to dismiss the bill.

Mr. *Jenkins*, *amicus curiæ*, observed, that he also was counsel in *Wise v. Palmer*, and that the application just referred to was made pending a motion by the plaintiff on the bill and answer for a receiver.

His HONOR said he must have a note of the case referred to, and that he would look at it, before disposing of the present application.

Mr. *Burroughs* then said, that the plaintiff had served notice of a motion which he had been instructed to move, for liberty to file a new bill in this cause, pursuant to the 52d General Order of November, 1834, notwithstanding the amendment of the original bill, after answer. Although this application could not be material, unless that just made should be refused, it might most conveniently be mentioned now, as most of the facts were before the court on the preceding application, and therefore both might be disposed of at once. The affidavit of Mr. *Hickie*, already mentioned, stated that it would be necessary to file a new bill under the 52d General Rule, for the purpose of putting in issue the agreement for compromise already mentioned, and the several matters in relation to it. That a new bill had accordingly been prepared and engrossed, but when it was brought to be filed, the Officer was of opinion that he would not be warranted in receiving it without an order of the court, as the original bill had been amended after answer.

MASTER OF THE ROLLS.—The question upon this application resolves itself to this, what is this "new bill" mentioned in the 52d New Rule? It is in the nature, not of an amended, but of a supplemental bill; and I have always thought that a plaintiff should be at liberty to file a supplemental bill, as well before as after issue joined, without any order of the court for that purpose. I know that in the court of Exchequer, in the time of Lord Guillamore, when applications have been made for liberty to file supplemental bills, his Lordship used invariably to put aside the notice, and ask, why should he make an order that was unnecessary? However, as the late Master of the Rolls paid a great deal of attention to the rules of November, 1834, and gave several instructions respecting them to the Officers of the court, I shall cause inquiry to be made as to the practice in the office, respecting this new bill, filed under the 52d New Rule.

Thursday, July 11th.

His HONOR now said,—I have looked at my note of the application in *Wise v. Palmer*, in Michaelmas 1837, and find it is exactly in point:

so that my decision in that case must govern my judgment now. In that case, the plaintiff served a notice on the defendant, on the very day the time for answering was to expire, of a motion that the bill might be taken as confessed against him, and that a receiver might be appointed. On the same day, the defendant filed his answer, and gave notice of it to the plaintiff. In a day or two afterwards, the plaintiff served a second notice on the defendant, withdrawing so much of the former notice as related to the taking of the bill as confessed; but apprising the defendant that he would move, pursuant to the former notice, for the appointment of the receiver; and that on the motion, he would rely upon the bill and the defendant's answer. The object of this was to save the former notice, which was served on the last day for serving notices for the Trinity sittings. The defendant's answer was filed on the 19th of June, 1837. Pending the motion for the receiver, which was ordered to stand over until Michaelmas term, on the 18th of August—the very last day of the two months after notice of the defendant's answer,—the plaintiff delivered exceptions for the insufficiency of the answer. On the 2d of September following, the Master disallowed the exceptions. On the 26th of October, the defendant served notice that he would move that the bill might be dismissed for want of prosecution, under the 93d rule.

Upon the motion for the receiver, I made no rule; but ordered that the costs of that motion should abide the decree as to the costs.

The defendant then moved, pursuant to his notice, that the bill should be dismissed. The motion for a receiver was not such a proceeding as would bar the entry of a rule to dismiss the bill for want of prosecution: *Mitchell v. Dougall* (a). But the plaintiff insisted that the motion was premature; as, by the 75th New Rule, the defendant's answer could not be held to have been deemed sufficient, until the 2d of September, when the Master overruled the exceptions; and, therefore, that the motion on the notice of the 26th of October must fail.

It further appears from my note, that, in my judgment in that case, I said, that having considered the 73d and 75th New Rules, I thought it not an easy matter to say from which period the time should run, when exceptions had been delivered and disallowed, or no report obtained upon them,—whether from the expiration of the two months after notice of the answer; or from the date of the Master's report disallowing, or the expiration of the three weeks after the delivery of the exceptions. But upon the literal construction of the rules, I decided that it should be from date of the Master's report; or, in case the report was not obtained within the time limited by the 75th rule, from the termination of the three weeks from the delivery of the exceptions; and I therefore

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(a) 1 Hog. 256.



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made no rule upon the motion, but desired that the parties should abide their own costs.—I still feel the difficulty which I then expressed as to the construction of those rules, and am by no means certain that my decision in that case was according to the intention of the rules. However, as settlement of the practice is of more importance than the precise construction of the rule, I shall abide by my decision in *Wise v. Palmer*, and therefore upon the defendant's motion in this case I shall say, no rule; and let the parties abide their own costs.

Now as to the plaintiff's application for liberty to file a new bill, pursuant to the 52d New Rule, I have caused inquiry to be made in the office respecting the practice there as to such new bills, and find that they are there treated as supplemental bills, and indorsed as such by the clerks. I am therefore of opinion that there was no need of this application, and that the plaintiff was entitled to file the new bill, under the 52d New Rule, as of course.

Order.—The court doth decline to make any order for leave to file a new bill, pursuant to the General Order, bearing date 29th day of November, 1834, No. 52, not considering any such order necessary; but doth declare that the plaintiff shall be at liberty, if he shall think fit, to amend his bill at any time within one fortnight from the date of this order, by stating therein the agreement to refer the matters in dispute in this cause to the arbitration of Pierce Mahony, and the proceedings on such reference and in relation thereto, as mentioned in the affidavit of James G. Hickie filed in this cause, &c.; and let the parties abide their own costs of this motion.

—◆—  
*Thursday, July 4th.*

**PRODUCTION OF TITLE DEEDS, &c., UNDER DECREE—  
182d GENERAL ORDER OF NOVEMBER, 1834.**

**CHAYTOR and others v. CHAYTOR and others.**

Under the  
182d General  
Order of Nov.  
1834, the Mas-  
ter should ex-  
ercise his dis-  
cretion, and  
certify what books, papers, or writings respectively should be lodged in his office, or produced for inspection only; although the decree under which he may be proceeding requires the parties to bring in, and deposit with the Master, *all* deeds, writings, &c. in anywise touching or concerning the premises, in their possession or power respectively: until the Master certifies, the deeds need not be produced.

Mr. MONAHAN, on behalf of Edmund Byrne, a creditor having the carriage of the decree in this cause, moved for an attachment against the defendant, John Chaytor, and the plaintiff, Harriet Maria Chaytor, for not bringing in and depositing with the Master the several deeds,

writings, and muniments of title, in their possession or power respectively, pursuant to the decree in this cause; or for such other order, &c. The decree directed "that all parties do bring in all deeds, writings and muniments, in any wise touching or concerning the premises, in their possession or power respectively, and deposit same with the Master." On the 6th of June, 1838, the court made a conditional order upon the plaintiffs' solicitor to bring in and lodge with the Master certain title deeds relating to the premises; and as cause against that order he filed an affidavit, stating that he had not, and never had in his possession or power any of the deeds, which he believed to be in the possession of his client, Mrs. Chaytor, and her husband, the defendant, John Chaytor.\* On the 6th of June last, the creditor having the carriage of the decree served the plaintiff and her husband with an extract of that part of the decree relating to the production of the title deeds, and at the same time called upon each of them, by notice, in writing, to bring in the particular title deeds which appeared, by the affidavit already mentioned, to be in the possession of them, or either of them, and all other deeds, writings and muniments touching or concerning the several matters directed by the decree in this cause, in his or her possession or power; and apprising them that, in the event of their declining so to do, an application would be made for an attachment against them.

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Mr. J. J. Murphy, for the plaintiff, and Mr. Kennedy, for the defendant, J. Chaytor, opposed the motion.—Mr. Monahan's client has not complied with the 182d rule,† under which the Master's certificate should have been obtained as to the documents to be lodged in the office, or produced for inspection merely, and the notice calling on the plaintiff and her husband to lodge or produce the deeds should have followed exactly the certificate of the Master. The rule just mentioned is a transcript of the 60th New Rule in the court of Chancery in England, under which it is held, that the Master is to exercise the discretion given to him by that rule, to determine what books or papers shall be produced, though the order or decree, under which he is proceeding,

\* This was a revived suit: the original cause having abated by the marriage of the plaintiff.

† 182d General Order, November 1834. "When by any decree or order, books, papers or writings are directed to be produced before the Master, for the purposes of such decree or order, it shall be in the discretion of the Master to determine what books, papers or writings are to be produced, and when, and for how long they are to be in his office; or in case he shall not deem it necessary that such books, papers or writings should be left or deposited in his office, then he may give directions for the inspection thereof by the parties requiring the same, at such time and in such manner as he shall deem it expedient."

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KELLY  
v.  
BUTLER.

of money, and not for the purchase of an annuity: that it was agreed, that the sum of £350 should be advanced to the defendant upon the terms of her securing payment of interest upon it, at £10 per cent; and the repayment of the principal by an insurance upon her life for the amount. That the rent-charge was a mere device to evade the statutes against usury; and that in all the letters written by the plaintiff's agent and present solicitor, pending the negotiation for the advance of the money, and immediately before the execution of the deed, the transaction was characterised as a *loan*. That upon payment of the £294. 2s. aforesaid, it was expressly stated that the plaintiff retained the sum of £18 as and for the first year's insurance premium; and the sum of £37. 18s. as and for the costs of preparing the said deed, although the said costs had neither been served on the defendant, nor taxed. She positively denied that the head-rent was in arrear, and insisted that the property was an abundant security for the plaintiff's demand.

The plaintiff's counsel submitted, that although there possibly might be a question for the hearing of the cause, yet, upon the present motion, the defendant's unproved allegations could be of no avail against her solemn deed. This case is not distinguishable from *Richards v. Gould (a)*, in which Sir A. Harte granted the application.

Messrs. *W. Brooke*, Q. C., and *Maley*, for the defendant, submitted that the dealing of the parties could not be considered otherwise than for a loan. The repayment of the principal was to be secured by an insurance on the defendant's life, and the amount of the first year's premium of insurance had been expressly retained out of the £350; the deed was therefore nothing more than a disguised security for repayment of the principal, and payment of interest at the rate of £10 per cent: *Chillingworth v. Chillingworth (b)*.—[MASTER OF THE ROLLS. It was decided in *Byrne v. Kenniffeke (c)*, that the agreement for an insurance did not of itself render the grant of an annuity, exceeding the legal interest on the money advanced, a mere colorable security for an usurious loan; though, as in this case, the first year's premium was to be paid by the grantor, i. e., subtracted from the money advanced.]—It is admitted that the insurance *per se* does not prove the corrupt agreement; but in connection with the other facts it becomes a serious item in the proof; *Doe d. Grimes v. Gooch (d)*. In the case of *Byrne v. Kenniffeke*, the Chief Justice, in delivering the judgment of the court, said, "such a transaction may be made the cover of an usurious loan." In that case, the question depended entirely upon the existence of the insurance, and the fact that the first year's premium had been paid by

(a) 1 Moll. 22.

(c) Batty's R. 269.

(b) 8 Sim. 404.

(d) 3 Bar. and Ald. 664.

the grantor: there was no proof of a dealing for a loan. But here the defendant sets out in her answer the agreement in detail, and refers to the letters of the plaintiff's own agent and solicitor, which can leave no doubt that the intention of the parties was for a loan, to be repaid, and not for the purchase of an annuity. It further appears that the deed does not truly state the consideration, either as to the sum advanced, or the mode of payment. Only £194. 2s. was paid at the date of the deed. The plaintiff refused to make any further payment for several months afterwards, and at last paid only £100, as the residue, insisting upon her right to retain £18 for the first year's premium of insurance, and the extravagant sum of £37. 18s. for the costs, neither served nor taxed. In *Richards v. Goold*, cited on the other side, Sir A. Harte said, that "if it could be shewn, looking to the instrument upon which the plaintiff founds his title, that his annuity was clearly void, the court would, under those circumstances, refuse a receiver. Further, if it were doubtful, and that the court found it necessary to inform itself by means of an inquiry, then, on an interlocutory motion for a receiver, the court would refuse, pending the issue, to make the order." There is, in this case, a question proper for a jury; and if the court would now direct an issue, there can be little doubt that upon production of the letters of the plaintiff's agent and solicitor, referred to in the defendant's answers, the jury would find that the dealing of the parties was for a loan, and not for a purchase. But even if the court should be disposed, upon the authority of *Byrne v. Kennifecke*, to hold, in the absence of positive proof to the contrary, that the dealing of the parties in the present case was *bona fide* for the purchase of an annuity, yet, upon the authority of *Drought v. Eustace*(a), the plaintiff's title to the annuity must fail; for the alleged purchase-money was not paid for several months after the annuity began to accrue. In the case last-mentioned, Sir A. Harte fully admitted [p. 337] the principle of the decision in *Byrne v. Kennifecke*; and held, that although there was no ground for setting aside the annuities on account of fraud, or inadequacy of price, "still it was impossible to suffer them to stand on another principle, which requires that the consideration shall be actually paid for annuities, and grants of the like nature, fully and precisely as the deed expresses. A man parting with his income, for eight years' purchase, is entitled to this protection, that the purchase-money shall be paid at the instant, or be tendered to be paid." It is therefore submitted that the plaintiff's title to the annuity cannot stand, and that the present case comes within the exceptions mentioned in *Richards v. Goold*, in which Sir A. Harte said, the court would not appoint a receiver upon interlocutory motion.

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(a) 1 Mol. 328.

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MASTER OF THE ROLLS.—The deed, upon which the plaintiff relies, is, as I collect, unobjectionable in form. It recites the defendant's title, and an agreement between the plaintiff and defendant for the purchase of an annuity: it then witnesses that in consideration of £350, paid by the plaintiff to the defendant, at the time of its execution, the defendant thereby granted to the plaintiff an annuity of £52, for the defendant's life, payable out of the premises. The defendant admits the execution of this deed; and it is also material, at least upon this motion, that it was executed in the presence of the two solicitors, respectively concerned then and now for the plaintiff and defendant; and that the annuity was regularly paid pursuant to the deed, for two years: however, three gales being in arrear, the plaintiff has filed her bill, and now moves upon it, for a receiver.

The defendant, being in receipt of the rents, has filed an answer, impeaching the deed, and alleging that the dealing of the parties was in fact for a loan, and not for the purchase of an annuity. She sets forth several letters upon the subject, written shortly before the execution of the deed by the plaintiff's solicitor and the agent negotiating on the plaintiff's behalf, in which the term *loan* is used to express the subject of the agreement in contemplation. It is said that the letters truly state the dealing and intention of the parties, and that the deed does not; but, in the absence of proof, I think the natural inference is the other way; and that an instrument prepared and executed with so much form as the deed, was more likely to express the intention of the parties than the comparatively loose statement in a letter of the agent on one side. As to the allegations of the defendant herself, they are as yet unproved, and cannot avail against her solemn deed; especially, as the object of those allegations is, that she may retain the receipt of the rents. What the shape of this cause may be when it comes on to be heard, it is needless to surmise. At present the simple question is, whether the plaintiff has presented such a case as should induce this court to interfere and take the receipt of the rents into its own hands, until the rights of the parties shall be ascertained? I think she has: she shews a clear *prima facie* title upon the deed:—it is admitted that three gales of the annuity are unpaid; and the plaintiff states that the premises are a slender security for her demands, and that the head rents are in arrear. *Richards v. Gould* seems to be a precise authority for the plaintiff's application.

Motion granted.

## REVENUE EXCHEQUER.

*Tuesday, November 27th, 1838.\**

COUNTY TREASURER—RECOGNIZANCE—PRINCIPAL  
AND SURETY—CURRENCY—CROWN—CREDITOR.

The QUEEN *v.* GEORGE O'CALLAGHAN.

Same *v.* WILLIAM CASEY.

Same *v.* EDWARD O'CALLAGHAN.

Same *v.* CORNELIUS O'BRIEN.

Mr. MOORE, Q. C., on behalf of the defendants, this day moved the court, that all further proceedings in these causes might be stayed, and that W. H. M'Grath and W. S. Molony, third persons, for and on behalf of said several defendants, might be at liberty to lodge in court, or pay the same over to Charles Mahon, Esq. the present treasurer of the county of Clare, to be placed to the credit of said county, or otherwise, as the court might direct, the sum of £6,461. 10s. 9d. sterling, equal to the sum of £7,000 late Irish currency, secured by the recognizance entered into and acknowledged on the 18th of July, 1831, and that thereupon the said recognizance of George O'Callaghan and his sureties might be vacated.

The facts of the case, as appearing on the motion, were as follows:—

In the year 1831, George O'Callaghan, the defendant in the first cause, was appointed treasurer of the county of Clare, and on the occasion of his election to that office, he and the defendants in the other causes, together with J. S. Vandaleur, entered into the recognizance in question, which was in the following form:—

"BE IT REMEMBERED, that on the 18th day of July, 1831, G. O'Callaghan, of, &c. Esquire, came before the Honorable Richard Pennefa-

Upon the appointment of A. to the office of county treasurer in 1831, he, together with four other persons, B. C. D. and E. entered into security by recognizance, whereby A. acknowledged himself indebted to the King in £7000 sterling; by the same instrument, B. and C. acknowledged themselves to be jointly and severally indebted in £5,000 sterling; and D. and E. in like manner, in £2,000 sterling. In the condition \* (which was, that A. should

\* First of the eight days after MICHAELMAS TERM.

duly account pursuant to the 4 G. 4, c. 33,) the instrument was described as "the foregoing recognizance." In 1837, A. resigned the office of treasurer, being a defaulter to the amount of £18,000, and upwards, of which a sum of about £4000 was due to the Crown, and the residue to the county.

*Held*, that this was a recognizance securing a single sum of £7000, and no more.

*Held*, also, that £7000 *British* was the amount thereby secured, although the amount which the 4 G. 4, c. 33, required such treasurer to secure was £7000 *Irish*.

And it appearing, from the condition of the instrument, that the parties stood in the situation of principal and sureties—*Held*, that on payment of that sum by A., the principal, he was entitled to have the recognizance of himself and sureties vacated.

But *Held*, that on payment of that sum by the sureties, they were not entitled, as against the Crown, to the benefit of the recognizance acknowledged by A., the principal.

Sureties of a county treasurer paying the amount of his recognizance are not, by reason of such payment, entitled to priority over the Crown, there being a debt due by such treasurer to the Crown, *ultra* the amount of the recognizance.

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 THE QUEEN  
 v.  
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 LAGHAN.

"ther, third Baron of his Majesty's Court of Exchequer in Ireland, and  
 "acknowledged himself to be indebted to our sovereign Lord the King,  
 "his heirs and successors, in the sum of £7000 sterling, to be levied off  
 "all and singular his goods and chattels, lands, tenements, and heredi-  
 "taments.

"And on the same day, and in like manner, J. S. Vandeleur, of, &c.,  
 "and C. O'Brien, of, &c., Esqrs., came and acknowledged themselves to  
 "be jointly and severally indebted unto our sovereign Lord the King in  
 "the sum of £5000 sterling, to be levied off their and each of their goods  
 "and chattels, lands, tenements, and hereditaments.

"And also, on the same day, and in like manner, W. Casey, of, &c.,  
 "and E. O'Callaghan, of, &c., Esqrs., came and acknowledged themselves  
 "to be jointly and severally indebted unto our sovereign Lord the King  
 "in the sum of £2000 sterling, to be levied off their and each of their  
 "goods and chattels, lands, tenements, and hereditaments.

"Whereas the above bounden G. O'Callaghan has been duly elected  
 "treasurer of the said county of Clare, at a meeting of the magistrates of  
 "said county, held at Ennis, in said county, on the 13th day of June  
 "last.

"Now, the condition of the foregoing recognizance is such, &c."

The condition was to the effect, that if the said G. O'Callaghan should  
 account, in manner required by the 4 G. 4, c. 33, or by any other act  
 in force in Ireland for regulating the office of county treasurer, or by  
 any law that should thereafter be made relating to the same, and should  
 duly discharge the duties of his office, and, at his death, resignation, &c.,  
 deliver to his successor in office all books, &c., and hand over to such  
 successor any balance that should appear to be due—

"That then, and in such case, the foregoing recognizance to be null  
 "and void, and of no effect; otherwise, the same to stand and remain in  
 "full force and virtue in law."

G. O'Callaghan continued to act as treasurer until the 8th July,  
 1837, when he resigned, being then indebted to the county in the sum  
 of £18,808. 7s. 3½d., of which it was stated that a sum of £4,000 and  
 upwards was due to the Crown, being the amount of certain sums raised  
 from time to time, by presentments, to repay advances which had been  
 made to the county from the consolidated fund.

In May 1837, George O'Callaghan, before his resignation of the  
 office of treasurer, sold one of his estates bound by the recognizance, for  
 the sum of £7,438. 12s. 5d.; and for the purpose of indemnifying the  
 purchaser against any proceedings on foot of the recognizance, and pro-  
 viding a fund for the payment of it, it was agreed that the sum of £7000,  
 late currency, part of the purchase-money, should be invested in the  
 purchase of 3½ per cent. government stock, in the joint names of W. H.

M'Grath and W. S. Molony (the third persons mentioned in the notice of motion), as trustees for the above purposes. The money was accordingly invested in the purchase of stock, and a trust deed subsequently executed, whereby the trustees were authorised and empowered to apply the stock for the purpose of procuring the recognizance to be vacated. The dividends, in the mean time, were to be received by G. O'Callaghan.

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Mr. *Moore*, Q. C., with whom were Mr. *Henn*, Q. C., and Mr. *James O'Brien*, for the defendant.

The first question is, whether the recognizance is to be considered as a single security for one sum of £7,000, or as a security for the several sums in which the parties to the recognizance became bound, amounting, together, to the sum of £14,000? The former is the true construction of the instrument. This is analogous to the case of a joint and several bond, in which, although there may be several judgments and separate executions, there can be but one payment of the principal sum. The condition describes the instrument as "the foregoing *recognizance*," thus clearly designating it as a single security. The 4 G. 4, c. 33, the act by which the amount of treasurers' securities is regulated, is expressly referred to in the recognizance. By the 4th section, it is provided that treasurers shall, before acting, enter into recognizance to the Crown, with not less than two, and not more than six sureties, to the amount specified in the first schedule thereto annexed; and by that schedule, the sum of £7,000 Irish is stated as the amount of the security required from the treasurers of second class counties, in which class Clare is included. Inasmuch, therefore, as the sum which that statute required the treasurer to secure, was the sum of £7,000, late currency, no further sum, in the whole, should be considered as secured by, or recoverable under the recognizance. Again, if G. O'Callaghan had, at the time of his being appointed treasurer, lodged in court the sum of £7,000 Irish, under the 6th section of that act, neither he, nor any person as his surety, would have been required to enter into any recognizance: a fact which furnishes a strong additional argument against any greater sum than £7,000 Irish being considered as secured by the recognizance.

Secondly, it is clear, from the condition of the recognizance, that the parties stand in the situation of principal and sureties; and, consequently, if the construction contended for at the other side were to prevail, and the Crown were at liberty, after payment of £7,000 by O'Callaghan, to levy a similar amount from the sureties, the latter would be deprived of their equity as against the principal; it being a settled rule of equity, that where the sureties pay the debt of the principal, they are entitled to stand in the place of the creditor, and to have the benefit of his securities.



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The *Attorney General*, with whom were the *Solicitor General* and Mr. *Pigot*, Q.C., for the Crown.

This very question came before the Master of the Rolls in November, 1837, upon a petition presented by G. O'Callaghan, praying to be at liberty to lodge the sum of £7,000, for the purpose of having the recognizance vacated. His Honor refused the application, and expressed a strong opinion against the right of the petitioner to the relief he now seeks to obtain by the present motion.\* The recognizance in this case is not in the common form. According to the obvious construction of the instrument, it comprises three distinct recognizances, securing three several sums, amounting in the whole to £14,000; and it cannot be considered as a single recognizance, securing a single sum of £7,000. There is nothing to prevent security being taken in a larger sum than that required by the statute.

The circumstance of G. O'Callaghan being a debtor to the Crown, *ultra* the amount of the recognizance, disentitles him to any assistance from the court in getting rid of the debt secured by the recognizance; and the case of *Galloway v. the Commissioners of Portumna Bridge (a)*, as cited by the Master of the Rolls on the occasion already referred to, is an authority to shew, that the Crown may appropriate this money to the discharge of the debt not secured by the recognizance.

WOULFE, C.B., and RICHARDS, B.—A person paying money has a right to allocate it to the payment of any demand he pleases. That is, therefore, a most extraordinary decision. Here G. O'Callaghan seeks to be at liberty to pay the money on foot of the recognizance.

Mr. Sergeant *Greene*, for the county of Clare.—The court cannot comply with this application, without doing great injustice to the county, for which the Crown may be considered as a trustee. The county is as much entitled to the favourable consideration of the court as the sureties are. This is not an application on the part of the sureties, but on the part of principal and sureties, to have their recognizances vacated, on payment of £7,000 by the principal. The object of the motion is, to get rid of three several recognizances by the payment of one sum of £7,000; the result of which will be, that no security by recognizance will remain for the balance of £11,000 due by G. O'Callaghan to the county. The court ought not, therefore, to assist him in getting rid of the recognizance, by which a portion of that debt is secured. The Crown may recover the amount of the recognizance from the sureties, and afterwards proceed against the principal. Independently of his recognizance, a county treasurer is a Crown debtor, treasurers being made accountable

(a) See a report of this case, 3 Law Rec. 2d Ser. 207.

\* For the judgment pronounced by the Master of the Rolls on that occasion, *vide post*.

to the Crown by the 21 & 22 G. 3, c. 20, and 7 G. 4, c. 49, s. 8. The right of a surety, who pays the demand of a creditor to the benefit of his securities, as against the principal debtor, has never yet been recognised as applying to a case where the Crown is a party beneficially interested; nor has the surety such equity in any case where the creditor's whole debt has not been paid off or satisfied.

At all events, these are not questions to be decided in a summary manner upon motion—[PENNEFATHER, B. In my opinion, no great difficulty can exist as to the construction of this instrument;—the only substantial question being, as to the rights of the Crown. If this were an ordinary case of principal and surety, I think it is clear that these parties would be answerable only for the one debt. Does the circumstance of the Crown being a party interested make any difference?]

[CHIEF BARON. With respect to the construction of the instrument, there is a clue to the intention of the parties, viz., the act of parliament, in compliance with which the recognizance purports to have been entered into.]

In consequence of the large amount of property involved, an arrangement was suggested by the COURT, and acceded to by the parties, whereby the motion was to stand over, to admit of a bill being filed, for the purpose of bringing before the court, for its decision in a more solemn manner, the questions which had been discussed upon the motion.

A bill was accordingly filed, in which three of the sureties, Casey, O'Brien, and E. O'Callaghan were the plaintiffs; the Attorney General, G. O'Callaghan, and the fourth surety, J. S. Vandeleur, the defendants; the last-mentioned person being charged to be out of the jurisdiction.

After stating the appointment of G. O'Callaghan as county treasurer in 1831, and setting forth the recognizance at length, the bill stated that G. O'Callaghan resigned the office on the 8th of July, 1837, being then indebted to the county in the sum of £18,000, and upwards.

That pursuant to the statute 1 & 2 Vict. c. 104, the Chief Remembrancer proceeded to ascertain the sum due by him to the county, and the liabilities of the county; and that upon certificate to the Lord Lieutenant, it appeared he was a defaulter to the amount of £18,808. 7s. 5½d., which included a sum of £4,234. 17s. 7½d. being the amount of certain sums, which had been from time to time raised and levied by presentments of the grand juries for the time being, of the county of Clare, for the purpose of paying various sums which had theretofore been advanced out of the consolidated fund, or advanced by the collector of excise for the county of Clare, and the amount of which presentments had been paid to G. O'Callaghan, as such treasurer; and that said sum of £4,234. 17s. 7½d. had not been since paid to the collector of excise of the county of Clare, or to the collector of excise in Dub-

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lin ; and that said last-mentioned sum accordingly now remained due to the Crown by the said G. O'Callaghan.

The bill then charged, that proceedings having been threatened against the plaintiffs, on the part of the Crown, on foot of their recognizance, they had (with the assent of the Attorney General,) paid to the present treasurer of the county Clare the sums for which they were severally bound on foot of the recognizance.

That G. O'Callaghan had refused to pay any thing on foot of the recognizance, and that there had been neither judgment nor execution on foot of the *scire facias* against him. That the plaintiffs had applied to the Attorney General for liberty to put his recognizance in suit in the name of the Crown, for their benefit. That notwithstanding the payments by the plaintiffs, it was alleged that her Majesty is entitled to the benefit of the recognizance against G. O'Callaghan, in priority over the plaintiff.

The bill, therefore, prayed that the plaintiffs might be decreed entitled to the benefit of the recognizance acknowledged by G. O'Callaghan, and might be declared at liberty to put the recognizance in suit against him, in the name of her Majesty, and to proceed thereon as they might be advised, for the purpose of recovering, by means thereof, the said sum of £7,000, late Irish currency, being the amount of the several sums paid by the plaintiffs respectively ; and that, if necessary, her Majesty's Attorney General might be directed to permit the plaintiffs to take such proceedings.

To this bill there was a general demurrer on the part of the Crown.

#### EQUITY EXCHEQUER.

*Saturday, January 26th, 1839\**

Mr. *Sherlock*, with whom were the *Attorney General*, the *Solicitor General*, and Mr. *Pigot*, Q. C., for the Crown.

The questions that present themselves to the consideration of the court, in the present instance, are these—Whether the recognizance of the principal and sureties is for several and distinct sums, amounting together to the sum of £14,000, or whether the true meaning and construction of the recognizance is, that it should stand as a security for the sum of £7000 only ; and next, if the court should decide that the recognizance is intended to cover the sum of £7000 only, whether the sureties, who have paid that amount to the Crown, are entitled, as against the Crown, to priority over the balance remaining due to the Crown from the principal debtor, Mr. O'Callaghan.

\* Hilary Term.

The first point having been discussed at some length on a former occasion, it is now unnecessary to dwell upon it, or repeat the observations which were then made.

But supposing that the court may be against the Crown on that point, it then becomes necessary to consider, whether the sureties who have paid the full amount of the recognizance, are, by reason of such payment, entitled to stand in the place of the Crown, and repay themselves, before the Crown can recover the balance remaining due to it from the principal debtor. The general principle is admitted, that a surety who pays the demand of a principal creditor, is entitled to stand in his place, and to have the benefit of all his securities to repay himself; and this not only as against the debtor and his other creditors, but even as against the principal creditor himself, if he has other demands against the debtor. It remains to be considered, whether that doctrine extends to the case of the Crown? or whether, in the present instance, the principle is at all applicable? As this is a question of priority between a Crown debt and a debt to a subject, and as the plaintiffs come in to seek for the equitable interference of this court against the Crown, it is necessary to consider the privileges and preference which the Crown enjoys in the priority of its debts. In the case of the *King v. Allnutt* (a), this point is discussed at some length, and Chief Baron McDonald says, "By the common law, the Crown was entitled "to be satisfied its debt, before the subject can take out any execution at all." And again, "Where the King's and the subject's titles concur, the King's title shall be preferred." This position is laid down very strongly in *Bacon's Abridgment*, 457, *tit. Crown Property*—"If a man enters into an obligation to two, and one of the obligees assigns "to the King, or is outlawed, the King may bring an action in his own name, and shall recover the whole debt to his own use; for the King "cannot, by reason of his dignity, be partner with his subject, neither "can he lose his right."

In the present instance, as between the Crown and the plaintiffs, the Crown has a clear priority at law against the common debtor. For a surety who pays the debt of his principal, unless he gets some counter security, ranks only as a simple contract creditor; his remedy is by an action for money paid to the use of the principal, and nothing more, and the case is the same in Equity; *per* Brougham C. in *Hodgson v. Shaw* (b). On the other hand, the debt due to the Crown binds all the property of the debtor of every description, from the time of his appointment as treasurer, as if he had then stood bound by writing obligatory, in the nature of a statute staple; 21 & 22 G. 3, c. 20 s. 5.

Now, as to the principle, that a surety who has discharged the debt

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(a) 16 East, 278.

(b) 3 Mylne & K. 190.

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of the creditor is entitled to priority, even as against him,—such a principle can only be applied against the creditor where he has two distinct demands, and of a different nature; the balance remaining due, being of an inferior nature to that which the surety has paid off. But when the debt remaining due is of a higher nature, or equal to the debt paid off, he cannot be affected by the rights of the surety, for he claims altogether by an independent and distinct title; for a surety is not entitled to postpone all the demands of the creditor till his advances have been repaid; he is only entitled to priority over debts of an inferior degree. But here, both debts due to the Crown must be taken to be equal; they may be recovered by the same prerogative process; they both affect in like manner all the property of the debtor, and are charges paramount to the claims of any other creditor. Although there have been several cases in which parties paying off the demands of the Crown have been admitted to sue in the name of the Crown, and have had the advantage of Crown process to repay themselves; yet in all those cases, the Crown had been fully satisfied; and those parties derived their equity against other creditors from having paid off the Crown debt. And, on general principles, the court should not interfere where there is a *bona fide* debt due to the Crown, and where it has a prior right at law. And in a case between the Crown and a subject, the former should not be called on to part with its lien, and give up the peculiar prerogative process for the purpose of postponing its own rights. Under the circumstances, the debtor being a public servant of the Crown, entrusted with the custody of the public money, and a public accountant, whose debts and liabilities to the Crown have been peculiarly the subject of legislative enactments, the Crown has as good an equity as the plaintiffs; and in such a case, whatever rights they may have, as against the other creditors of Mr. G. O'Callaghan, they are not entitled to any priority over the Crown.

The COURT here stated, that they were disposed to adhere to the opinion they had intimated upon the motion with respect to the construction of the recognizance, namely, that it was a security for a single sum of £7,000 only.

Mr. James O'Brien, Mr. Moore, Q.C., and Mr. Henn, Q.C., for the plaintiffs. Upon the other branch of the argument, it is submitted, that the plaintiffs are entitled to the benefit of the recognizance, as against G. O'Callaghan, the principal, as if this were a question arising between subject and subject.—The Crown is not the party beneficially interested, it is but a trustee for the county.—[PENNEFATHER, B. The question must be argued as if the Crown were beneficially interested.]—Even so, the plaintiffs are entitled to the relief

they seek.—In an ordinary case, between subject and subject, the surety has a right to the benefit of the security, even to the prejudice of the creditor, who has other claims; *Ex parte Rushforth* (a); *Paley v. Field* (b); *Hill v. Kelly* (c); *Bardwell v. Lyddall* (d). And this rule extends to the case where the Crown is concerned, the surety having been held entitled to the benefit of the Crown process against the principal debtor; *Salkeld v. Abbott* (e); *Latouche v. Pallas* (f). [PENNEFA-  
THER, B. The Crown was merely a trustee in those cases; they do not, therefore, apply to the case where the Crown is the party beneficially interested.] The case of *The King v. Bennett* (g), and *Anon.* (h), would seem to shew that the circumstance of the Crown having a beneficial interest makes no distinction. In cases which might be referred to as establishing a contrary position, *Rex v. Marsh* (i), and *The Attorney General v. Atkinson* (j), the prerogative of the Crown was only relied on to shew that it was not obliged to resort, in the first instance, against the principal,—but that is not the question in this case. The Crown has been held liable to the same equities as a subject; *Pawlett v. The Attorney General* (k); *Burgess v. Wheate* (l); *Casperd v. The Attorney General* (m); *Foster v. Hargreaves* (n).

CHIEF BARON.—Those cases shew that where there is an equity against a subject, the demand of the Crown will not displace it; but in this case, a direct equity is sought by the sureties against the Crown.

RICHARDS, B.—If the debts due to the Crown and a subject be equal in degree, the prerogative of the Crown gives priority to the former. A surety has no right to call upon a creditor for an assignment of his securities, unless he thereby obtains a priority over his other demands.

The COURT, without giving judgment at length, allowed the demurrer to the bill, and made the following order upon the motion of the 27th of November, which they now directed to be renewed:—

It is ORDERED by the COURT, that on payment into the Provincial Bank of Ireland, in Limerick, to the credit of Charles Mahon, Esq., Treasurer of the county of Clare, the sum of £7,000, *British*, the amount secured by the said recognizance, the said recognizance of the said George Callaghan and his sureties, bearing date the 18th day of July, 1831, be vacated without further notice, and without prejudice to the right of her Majesty (if any), to proceed for recovery of any other, or further demands (if any), in such way as may be advised.

(a) 10 Ves. 409.

(c) Ir. T. R. 265.

(e) Hayes, 576.

(h) Saville, p. 30, pl. 7 2; and see West on

(i) M'Clel. 288.

(k) Hard. 469.

(m) 6 Price, 411.

(b) 12 Ves. 435.

(d) 7 Bing. 489.

(f) 1 Wight. 1.

(g) 1 Wight. 1.

(j) 1 Y. & J. 207.

(l) 1 Eden, 256.

(n) 1 Keene, 281.

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ant Cathcart's attorney had written to the attorney for the purchaser, requiring an immediate lodgment to be made of the balance of the purchase-money, which was accordingly made at the time above mentioned.

An affidavit was made in reply by the purchaser's attorney, stating that he did not receive the statement of title, and copies of the deeds and documents relating to it, until the 29th of December, 1830.

That on the 26th of January, 1831, the purchaser's counsel gave an opinion, to the effect, that a good title had been made out to the lands of Ballinveery and Kiltane, unless something adverse should appear on the searches thereby directed, but that a good title had not been made out to the other lands, viz., Rathkeale. That deponent immediately afterwards furnished a copy of that opinion to the plaintiff's attorney, who, on the 8th of February following, replied, that he would look into the title, and advise with the deponent upon it. That on the 2d of December, 1831, plaintiff's attorney obtained an order to invest the purchase-money so lodged, being £1,237. 10s., to which the purchaser made no objection, and which had since been fructifying for the benefit of the parties in the cause. That no further applications were made to deponent, nor any further reply given to him on the subject of title, until some time in the month of February, 1834, when deponent obtained a reference as to the title, and furnished plaintiff's attorney with a copy of the objections to it. That deponent required an answer to the objections, which he did not receive until the 20th of May, 1834.

That a summons having been issued on the objections and the answer thereto, the Chief Remembrancer made his report of good title, on the 30th of June, 1834, the plaintiff's attorney undertaking that the co-heiresses of a person of the name of Reeves, in whom the legal estate in the lands was vested, should execute the deed of conveyance to the purchaser.

That several other proceedings were had in the cause, which further delayed the perfection and execution of the conveyance to the purchaser until March, 1836, when the plaintiff's attorney was furnished with a draft of the deed, together with an opinion of the purchaser's counsel thereon.

The affidavit then proceeded to state, that the draft was not returned to the deponent until some time in the month of November, 1838, when the plaintiff's attorney returned it, together with a certain other deed, bearing date the 23d of October, 1838, which had been executed in pursuance of directions contained in the last-mentioned opinion of the purchaser's counsel.

The affidavit then stated, that the purchaser had never been in possession of the lands, nor in the receipt of the rents, since the sale, but that the latter had been received by the receiver in the cause.

That by an order of the 28th of November, 1836, a portion of the rents in the hands of the receiver was, with other sums, invested in

stock to the credit of the cause, and had since been fructifying for the benefit of the parties therein.

That neither deponent, nor Clarke, the purchaser, had ever been called on by any party in the cause to lodge the remaining three-fourths of the purchase-money, until the receipt of the letter of the 23d of October, 1837, from the defendant's attorney, a few days after which, a verbal requisition to the same effect was received from the plaintiff's attorney, and that the money was accordingly lodged, on the 4th of November following.

The affidavit further stated, that when Clarke purchased the lands of Ballinveery, the lease required to be renewed, and that the receiver in the cause had lately received the renewal and septennial fines, and interest from the tenants, but that no renewal had been executed. That with respect to the lands of Kiltane, they consisted altogether of cut-away bog, and were let to a solvent tenant, upon a determinable lease, at the expiration of which they were likely to prove but of little value.

The affidavit concluded by stating, that the deed of conveyance to the purchaser had not as yet been executed by any of the parties thereto, and that Clarke had always been ready and willing (if called on) to lodge the remaining three-fourths of his purchase-money, which, it was alleged, had been lying idle and unproductive.

Mr. *Smith*, Q. C., in support of the motion. The present application is not founded upon the principle of there having been default on the part of the purchaser, but upon the principle that the purchaser, although entitled either to the rents and profits of the purchased premises, or to interest on his purchase-money, is not entitled to both. This is a principle which is not only consistent with equity and good sense, but it is one which has been fully established by the authorities. Mr. Clarke became the purchaser of that which was substantially a *reversionary* interest, expectant on the life of Mrs. Hutchinson, the plaintiff; and in such cases it has been held, that the wearing out of the life is equivalent to the taking of the rents and profits; *Ex parte Manning* (a). That was the case of a sale of a reversion expectant on an estate for life, and the life having fallen in about the time the purchaser was ordered to bring in his purchase-money, a petition was presented, praying that he should pay interest from the time the report of the sale was absolutely confirmed. The court there observed—"From that time, the purchaser was sure of his title and of his purchase, though the tenant for life had died the next day; and from that time the life was wearing, which is equivalent to the taking of the profits; and in case the purchaser had taken the profits, he must certainly have paid interest."

(a) 2 P. Wms. 410.



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cause with a copy of the opinion of counsel obtained immediately after he had become the purchaser of the lots, and requiring that the necessary searches should be obtained, and the difficulty in the case removed; while, on the other hand, the parties who had the carriage and conduct of the cause had been, as it seems to me, guilty of very considerable *laches* and neglect.

I have made inquiry from the very experienced Officer of the court, and I find that a good deal of laxity exists in the practice of this court in respect to sales before the officer.

There is no rule here as there is in Chancery, prohibiting the officer from setting up for sale property decreed to be sold, until an opinion of counsel shall be had approving of the title, on a case prepared and vouched in point of accuracy by the plaintiff's attorney, and until all necessary title deeds for making out and sustaining the title shall be lodged.\*

\* *The following is a copy of the General Order of the court of Chancery, dated 17th June, 1805:—*

<p>“The Lord Chancellor is this day pleased to order, that, in future, no lands shall be set up for sale by any Master of this court under any decree or order for sale thereof, until a state of the title to such lands shall be produced to such Master, together with counsel's opinion thereon, that under such decree or order a good title (such as ought in the opinion of such counsel, to be approved of by a Master on a reference for that purpose), can be made to a purchaser of such lands under such decree or order, by the means to be specified in such opinion, and until the title deeds and other docu-</p>	<p>ments, necessary to make such title, shall have been deposited with the Master, and the Master shall be satisfied, by affidavit, that the statement of title on which such opinion shall have been given, is a true statement of the title to such lands, and that the parties before the court are all the parties necessary to make such title; or if any persons, not before the court, should appear to be necessary to make such title, that such persons are ready and willing to do the acts necessary for making a title to a purchaser under such decree or order, according to such opinion.”</p>
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*See also No. 178 of New Rules in Chancery, dated 29th November, 1834, of which the following is a copy.*

<p>“That the Master, in proceeding to a sale under a decree or order, shall take special care that the General Order, bearing date the 17th of June, 1805, has been effectually carried into execution, before he shall approve of or direct an advertisement for that purpose; and to that end, the Master shall inspect the abstract</p>	<p>of title lodged in his office; and shall certify thereon, that, as far as he can judge, the same is substantially a compliance with said order of 17th June, 1805; and the Master shall not sign any advertisement for the sale of the lands, if he has any doubt as to the correctness of the abstract of title.”</p>
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Again, there is no rule or practice here that makes it necessary the purchaser should lodge the remaining three-fourths of his purchase-money before confirming a sale under the decree of this court.

Neither is there any fixed or steady rule, as I understand, in respect to the payment of interest to a purchaser on his purchase-money in case of bad title. I am told that if a purchaser was to lodge the whole of his purchase-money, where he had reason to believe that a good title could not be made out, that he would not in all likelihood be allowed to burthen the funds in the cause with interest on such lodgment, and that the granting or refusing interest to a purchaser is always in the discretion of the court, and to be decided upon according to the circumstances of each case.

Now if there was a steady rule, that no property should be put up for sale until the opinion of counsel had been obtained upon a correctly stated case, and until the necessary title deeds should be lodged; and if no sale could be confirmed until the whole of the purchase-money should be lodged; there could be no doubt or question as to the duty of the parties in the cause on the one hand, or of the purchaser on the other: the lodgment of his purchase-money could not, in such a case, be treated as a speculation to make interest for himself at the expense of the funds; and the chance of setting up lands with a bad title would be greatly diminished, and much litigation would, in my opinion, be avoided.

I think the more fixed and certain we render the proceedings in respect to sales under the decrees of the court, the better: the less a purchaser is mixed up or involved in any of the proceedings in a cause, and the more plain we make his course, the greater will be the encouragement to monied persons to come in and bid under decrees of the court.

Had the purchaser, in this case, lodged his purchase-money for Rathkeale, when his counsel gave an unfavourable opinion on the title, I have over and over again asked, would he or not have been allowed interest on such lodgment, if in fact the title had not afterwards been made good? And I have been answered, that most probably he would not.

Now I must say, that I do not think it fair, that a purchaser should be put to act in this way, at his peril: we should have some defined and settled rule, by conforming to which a purchaser would be certain of not suffering a loss, in the event of his being unable to complete his purchase, on account of the defect of title.

Again I ask, if a purchaser obtains, as here, an opinion of counsel, conditionally approving of a title, but subject to the result of searches (a matter of no small importance), and that no searches are furnished for years afterwards by the vendor, is the purchaser to be held in default, for not lodging his purchase-money before he receives the searches? And if he does lodge his purchase-money under such circumstances, and

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that the title, upon the searches, proves defective, will he or not be allowed interest on his purchase-money?

In this unsettled and uncertain state of the practice of the court, I do not think I say too much, when I say that, in my opinion, until the Remembrancer's report of good title, in June 1834, had been obtained, it would have been hazardous, and even rash in the purchaser, to have lodged his purchase-money in court, upon the chance of a good title being made out to either of the denominations, Ballinveery or Rathkeale; or on the chance of his being allowed interest on his purchase-money, in the event of a good title not being made out.

Had he lodged his purchase-money in January 1831, and had the title ultimately proved bad, it, no doubt, would have been objected, when he came to demand interest, that he had not been called on to bring in the purchase-money; and that, inasmuch as he had volunteered to do so, under the circumstances of the case, he was entitled to nothing beyond the principal money which he had so brought in. But on the report of good title being made, in June 1834, I am of opinion that the purchaser should have lodged in court the residue of his purchase-money: had he done so then, this court would, I apprehend, have awarded him interest, if by any fatality the title had afterwards proved defective; for the court could not then have suspected him of bringing in his money merely with the view of getting interest for it.

From that period, therefore, I think he ought to pay interest on the remaining three-fourths of the purchase money.

I do not concur in the argument, that a purchaser of a reversion is not bound to pay interest on his purchase-money: I conceive, that he is bound to pay interest, and the authorities cited in the argument, in my opinion, fully establish this position. I conceive that the wearing out of the life is tantamount to rents and profits; and I only excuse the purchaser in this case from paying interest from the confirmation of the sales, because I am of opinion, regard being had to the practice of the court, as I understand it, and to the peculiar circumstances of this case, that the purchaser was not in default in not having lodged his purchase-money in 1831, or until the report of good title was obtained, for the reasons that I have already assigned; and also because I am of opinion, on the contrary, that the parties in the cause were in great default, in not having sooner made out the title to the purchaser of the lots in question.

With regard to the rate of interest at which the purchaser ought to be charged, I confess I feel greatly embarrassed: I can find no case precisely applicable to the present, which is very peculiar in its circumstances, and the unsettled state of the practice of the court in this respect increases my difficulty very much.

Upon the whole, I believe the most just and equitable course will be, to charge the purchaser with interest on his purchase-money for both the lots (Ballinveery and Rathkeale), at the rate of  $3\frac{1}{2}$  per cent., that being the rate of interest which would have been produced by the money had it been deposited in court, and invested in government stock, from the time the Remembrancer made his report of good title, but not to charge him with any interest prior to that date.

With regard to Rathkeale, it has been contended by the purchaser that a distinction exists, inasmuch as there was a profit rent payable thereout from the date of the purchase; but when it is considered that the profit rent is so small as £12. 15s. 3d. per annum, and the purchase-money so considerable as £1750, I think the sale of that lot will be found to class itself under the head of sales of reversionary interests, rather than of lands producing a present substantial profit, and I shall take no distinction in principle between the two denominations. Therefore—

Declare that, under the circumstances of the case, the said Patrick Clarke is not chargeable with interest on the remaining three-fourths of said purchase-moneys, except from the period of the report of the Remembrancer that a good title could be made to the purchaser; and declare that the purchaser is chargeable with interest at the rate of  $3\frac{1}{2}$  per cent.—being the rate of interest which the purchase-money would have produced, if said sum had been deposited, and invested in government stock, from the 13th June, 1834, being the date of the report of good title, to the 4th November, 1837, when the said three-fourths were deposited.

And declare the purchaser entitled to the profit rents of the lands falling due on the 1st of November, 1834, and the subsequent sales thereof, and to be paid the net sum received by the receiver on account thereof; and also entitled to any renewal fines and interest, and septennial fines and interest, due at the time of the purchase, or that have since fallen due: and, it being admitted that the interest which the said Patrick Clarke is herein before declared bound to pay, amounts to the sum of £217. 7s. 8d., and that the profit rent for three and a-half years, from the 1st May, 1834, to the 1st November, 1837, deducting receiver's fees, amounts to the sum of £39. 3s.; and that the fines and interest, and septennial fines and interest, received by the receiver, deducting receiver's fees, amount to the sum of £29. 16s.  $1\frac{1}{2}$ d., both said sums making together the sum of £68. 19s.  $1\frac{1}{2}$ d.; to credit for which the said Patrick Clarke is herein before declared entitled, and which being deducted from said

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sum of £217. 7s. 6d., leaves a balance of £148. 8s. 6½d. of such interest, and payable by the said Patrick Clarke:—Let said sum of £148. 8s. 6½d. be lodged in the Bank of Ireland to the credit of the cause, by the said Patrick Clarke, within one month, &c.

*Friday, April 26th.*

### HUSBAND AND WIFE—CONSTRUCTION OF WILL— FEME COVERTE.

KEENE v. JOHNSON.

J. S., by his will, gave and bequeathed unto his daughter D. T. wife of E. T., the sum of £500, to be for her own sole and separate use, and not to be in any manner subject or liable to the debts, contracts, or engagements of her husband, the interest, however, thereof, to be paid to and received by the said E. T. during his natural life. The testator charged a portion of his real estate with the payment of the above bequest. The husband and wife, by deed executed by both, assigned to a purchaser, for valuable consideration, their several and respective interests in the £500, and the interest payable thereon. A bill having been filed by the assignee to raise the charge:—*Held*, that D. T. and her husband were competent to make a valid assignment thereof to the plaintiff, and that the former had power, during her husband's lifetime, to dispose of her interest in the £500 so given to her separate use. On payment, therefore, of that sum, and the interest due, the lands charged with the bequest were decreed to be discharged and exonerated therefrom.

JOHN JOHNSON, by his will, bearing date in October, 1815, devised and bequeathed all his estates, both real and personal, to trustees, upon certain trusts. Amongst other devises and bequests, the will contained the following:—"I give and bequeath unto my daughter, Dorothea Tresham, wife of Edward Tresham, of," &c., "the sum of £500 sterling, "to be for her own sole and separate use, and not to be in any manner "subject or liable to the debts, contracts, or engagements of her said "husband; the interest, however, thereof, to be paid to and received by "the said Edward Tresham during his natural life."

The testator then charged a portion of his real estate with the payment of the said bequest. Subsequently to the testator's death, by indenture, dated in 1818, Edward Tresham, in consideration of the sum of £200, assigned the annuity or yearly sum of £30, the amount of the interest to which he was entitled under the said will, to W. S. Mason, subject to a proviso for redemption, on re-payment of the £200.

By indenture, bearing date the 19th of September, 1835, and made between W. S. Mason, of the first part; Edward Tresham, of the second part; Edward Tresham, and Dorothea Tresham, his wife, of the third part; and plaintiff of the fourth part; the said W. S. Mason, for the considerations therein mentioned, and in pursuance of the said proviso for redemption, re-assigned his interest in the said annuity or yearly sum of £30 to Edward Tresham; and the said Edward Tresham, and Dorothea, his wife, in consideration of the sum of £173 sterling, paid to the said Edward, and the sum of £240 sterling, paid to the said Dorothea,

assigned their several and respective interests and estates in the said principal sum of £500, and the annuity or yearly interest paid and payable in respect thereof, to the plaintiff, to hold to him and his heirs, executors, &c. for ever.

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The bill, which was filed on the 14th of April, 1836, prayed an account of what was due to the plaintiff for principal and interest, in respect of the said legacy or sum of £500, and that the sum found due might be raised by a sale or mortgage of the lands therewith charged.

The material question raised by the answer of the defendant, Wm. Johnson (the person entitled to the lands so charged by the will), was as to the construction of the above clause, containing the bequest to Tresham and wife. It was submitted, by the answer, that this was a bequest of an annuity, of the amount of the interest to accrue due in respect of the £500 to the husband, for his life, with a reversionary bequest of that sum to the wife, at the decease of her husband. The defendant admitted that he had refused to pay the principal sum of £500 to the plaintiff, inasmuch as he was advised that, under the terms of the bequest to Mrs. Tresham, she was not competent, during her husband's lifetime, to dispose of the same; and that as neither she nor the plaintiff was in a situation to give the defendant a valid receipt or discharge for the principal sum, so as to secure him against her claims, in case she should survive her husband, he, the defendant, would not be safe in paying the said sum, without the decree and indemnity of a court of equity, although he had been ready and willing to do so, in case he could have procured an effectual discharge and release for the same.

The defendant, by his answer, also offered to pay the principal sum of £500 into Court, to abide the event of the suit, and to be paid over to the plaintiff, if the Court should be of opinion that the said Dorothea Tresham and her husband had power to assign it.

Pursuant to an order, obtained upon consent, the money was subsequently paid into court by the defendant.

Mr. Warren, Q. C., for the plaintiff.—This is not the bequest of a reversionary interest to a married woman, but an absolute bequest to the wife in the first instance. From the language used by the testator, it is obvious that it was not his intention to postpone the wife's right of disposing of the property until the death of her husband. The case of *Barrymore v. Ellis* (a) goes much further to enable a *feme covert* to

(a) 8 Sim. 1.

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dispose of her separate estate, than it is necessary to go here ; for there it was held, that the wife had a general uncontrolled power over the annuity, although there was a non-anticipation clause in that case.—[CHIEF BARON. Here the bequest to the husband is incorporated with the bequest to the wife, and seems to be a modification of it.]—Yes, it is a qualification of the absolute interest originally given to the wife.

Mr. *Smith*, Q. C., and Mr. *Brewster*, Q. C., with whom was Mr. *Bland*, for the defendant.

As the defendant has brought the money into court, it is clear that delay is not his object ; he merely wishes to secure himself against being obliged to pay the legacy a second time, in the event of Mrs. Tresham surviving her husband. It is conceived, that according to the true construction of the will, it is a devise of the *interest* of the £500 to Tresham for life, and at his death, of the *principal* to his wife. If this be the true construction of the will, it might be contended, in case Mrs. Tresham should survive her husband, that the assignment to Keene, the plaintiff, was invalid as against the wife surviving. In consequence of the decisions in *Purdew v. Jackson* (a), *Honner v. Morton* (b), and *Watson v. Dennis* (c), a difficulty is felt with respect to the proper parties to release the defendant, who is, therefore, advised that he cannot safely pay the legacy without the directions of the Court.

CHIEF BARON.—*Purdew v. Jackson*, and the other cases cited from *Russell*, are cases arising on the power of the husband to dispose of the property of the wife, rather than on the power of the wife to dispose of property given to her separate use. It was held, in those cases, that although the wife joined in disposing of her property, yet, as she had done so during coverture, her act was a mere nullity. Those are cases in which the husband assigned the reversionary interest of the wife during her lifetime, and do not govern a case where the wife has a separate power to dispose of her property, such as she has here.

Mr. *Blake*, Q. C., in reply.

The COURT\* declared themselves to be of opinion that Mrs. Tresham had the power of disposing of her property, and made the following decree for the plaintiff:—

Declare the plaintiff entitled to the charge of £500, late currency, with interest thereon : and it appearing that said sum, being £461. 10s. 9d., present currency, with the sum of

(a) 1 Russ. 1.

(b) 3 Russ. 65.

(c) 3 Russ. 90.

\* The CHIEF BARON and Baron RICHARDS.

£30. 14s. 9d. British, being interest thereon from the 11th December, 1835, up to the 25th day of December, 1836, at the rate of £6 per cent., making together the sum of £492. 5s. 6d., have been deposited in bank, to the credit of the cause, by the defendant,—let the Accountant General draw on the bank in favour of the plaintiff, or his attorney thereto lawfully authorised, for the said sum of £492. 5s. 6d.; and decree the defendant William Johnson, his heirs, executors, administrators and assigns, and the lands and premises in the pleadings mentioned, from henceforth absolutely freed, exonerated, and discharged from the said bequest of £500, late currency, and every part thereof, and all interest thereon :—and all parties to abide their own costs.

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*Thursday, May 9th.*

#### ATTORNEY AND CLIENT—ATTORNEY'S LIEN.

WILLIAM STRANGWAYS, Petitioner, v. CHRISTOPHER HARMAN,  
Gentleman, Attorney, Respondent.

The petition in this matter stated, that in the year 1811, James Strangways, the petitioner's father, filed his bill in this court, for the purpose of setting aside certain documents purporting to be the will and codicil of one John Strangways, the grandfather of the petitioner, and also certain leases alleged to have been executed by the said John Strangways.

That petitioner's father died in 1820, whereupon petitioner caused a bill of revivor to be filed, and continued to carry on the suit. That William Harman, since deceased, and Christopher Harman (the respondent), were the attorneys in that cause for the petitioner.

That an order was made by the court, in June, 1825, directing an issue as to the due execution and validity of the said alleged will and codicil, and that upon the trial of the issue, the jury found a verdict against the documents so impeached, and establishing the right of the petitioner as heir at law to the lands and premises of which they purported to dispose.

That on the 20th of April, 1826, the cause was heard on the certificate of the verdict, and on the merits, when an objection having been

An attorney, who refused either to proceed with a cause unless furnished by the plaintiff with the necessary funds for that purpose,—or to hand over the papers to another attorney unless repaid the costs out of pocket,—

ORDERED upon the petition of the plaintiff, (his former client), to hand over to the new attorney such papers and documents connected with the cause, as, upon inspection, the latter

might deem necessary to enable him effectually to prosecute the suit, the petitioner consenting that the respondent should have a lien on any funds that might be thereby realized; and the new attorney undertaking to proceed without delay to bring the cause to a termination, unless counsel should otherwise advise, and in such case, undertaking to hand back to the respondent all deeds and papers, immediately on receiving such advice.



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taken to the bill, for want of parties, the court directed that the cause should stand over, with liberty to amend the bill by adding the necessary parties, and that the petitioner was subsequently advised to file a supplemental bill and bill of revivor for such purpose.

That about this stage of the proceedings, the Harmans refused to prosecute the cause further, unless petitioner supplied them with funds for that purpose; and that the cause had, in consequence, been dormant for upwards of ten years, during which period, two of the most material witnesses, who had been examined on behalf of the petitioner on the trial of the issue, had died,—whereby, and by reason of such delay, the petitioner believed great injury would be occasioned to him in the future prosecution of the cause.

The petitioner then proceeded to state that he had, from time to time, to the utmost of his power, made various payments to the Harmans, the particulars of which were detailed in the petition. That William Harman died in 1834, and that the petitioner had repeatedly applied to the respondent, to furnish his costs, but without effect.

That the petitioner was in a state of pecuniary distress and embarrassment, and was wholly unable to supply the respondent with funds to bring the cause to a termination, and that he had no means of paying any balance that might remain due to the respondent in respect of costs already incurred, save what might be realized by the successful issue of the suit.

It was further stated that, in order to save the expense of presenting the petition, the petitioner had by notice required the respondent to proceed with the cause, or, otherwise, to hand over to Mr. Ryan, an attorney (who was willing to proceed with the same if counsel should so advise), all papers, &c., upon the terms now proposed by the prayer of the petition, but that respondent had refused to proceed, unless supplied with funds to meet the expenditure to be thereby incurred (which petitioner was wholly unable to supply); or to hand over the papers, unless he were repaid the costs out of pocket already advanced by him.

The petition therefore prayed, that the said Christopher Harman might be ordered to hand over and deliver unto the said Henry Ryan all briefs of the pleadings in said cause, counsel's opinions thereon, attested and other copies of the answers of the several defendants, and all such documents, papers, and writings, in or connected with said cause, in his, the said Christopher Harman's custody, possession, or control, as, upon inspection and examination thereof, the said Henry Ryan may deem necessary to enable him effectually to prosecute the suit, and to bring the same to a determination,—upon the said Henry Ryan's undertaking that the said several documents should be so received by him, subject and without prejudice to the right of lien of the said Christo-

pher Harman thereon, in respect of any costs due and owing by the petitioner to him or to the said William Harman, deceased;—and upon the said Henry Ryan also undertaking to return to the said Christopher Harman, all such documents and papers as shall be so delivered, within ten days next after the final hearing of the said cause, and the pronouncing of the decree of the court therein, safe, whole, and uncanceled (damage by fire or other inevitable accident only excepted); and upon the said Henry Ryan further undertaking to carry on this cause with all due diligence and despatch, in case upon examination and inspection of the documents and papers aforesaid, counsel should advise such a course to be adopted.

The respondent filed an affidavit in reply, stating (amongst other matters), that the express terms upon which the said William Harman and the deponent had undertaken to carry on the suit, were, that the petitioner and his father should, from time to time, provide the money necessary to be expended in the progress of the cause.

The respondent also denied the accuracy of the petitioner's statements, with regard to the payments alleged to have been made on foot of costs;—he disclaimed any wish to embarrass the petitioner; and stated that he had made no demand for his time or professional services. He submitted, however, that it was but reasonable he should receive either payment of, or security for, the amount of those costs which had been incurred through a reliance upon petitioner's promises.

Mr. *T.B. C. Smith*, Q.C., (with whom was Mr. *Bracken*), now moved the matter of the petition.

The preliminary notice served on the respondent, as well as the prayer of the petition, are drawn up almost in the very terms of the order pronounced by Lord Cottenham, in the recent case of *Heslop v. Metcalf*(*a*). That case came before the Chancellor on appeal from the decision of the Vice-Chancellor, and all the authorities are there collected and reviewed by the Court. The conflict in that case was between the old and the new practice, the former giving the power of merely inspecting the documents, the latter making an order for their actual delivery.—It is obvious that the result of this application, if successful, will eventually be for the benefit of the respondent himself.

On the part of the Respondent there was no appearance.

RICHARDS, B.\*—The decision of Lord Cottenham does not appear to have pushed the principle further than it had been previously carried by Lord Eldon (*b*). It only devises a practical mode of working out

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\* *Solus*.

(*a*) 3 Mylne & Cr. 183.

(*b*) See *Colegrave v. Manley*. 1 Turner & Russ. 400.

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that principle;—the privilege of merely inspecting documents having been found but of little practical value. I will make one addition to the terms offered by the petitioner, as I think it but reasonable that the respondent should have an express lien upon any funds that may be realized in the cause. Therefore,

The petitioner consenting that respondent shall have a lien on any funds that may be recovered in the cause in the petition mentioned, grant the motion:—Henry Ryan, gentleman, the petitioner's attorney, undertaking to proceed effectually, and without delay in the said cause, so as to bring same to a termination, unless counsel shall otherwise advise, and in such case, undertaking to hand back to the respondent all such deeds and papers as he shall hand to him, immediately on receiving such advice.

*Friday, June 21st.*

TITHE COMPOSITION—RENT-CHARGE—PETITION  
 UNDER 1 & 2 VICT. c. 109, s. 16, PRAYING  
 EXEMPTION—MODUS DECIMANDI.

HOUSTON, Petitioner, v. KINAHAN, Respondent.

Upon application made by petition, under the 16th section of the tithe rentcharge act (1 & 2 Vict. c. 119) claiming a partial exemption on the ground of a *modus decimandi*—it was referred to the Remembrancer, to report whether the lands in question were

rightfully charged with tithe or tithe composition; and on the Remembrancer reporting the enjoyment of such *modus decimandi*, as contemplated by the act, said lands were declared not to be chargeable with tithe composition, and the applotment-book directed to be altered by the proper officer accordingly, without prejudice to the previous liabilities of the parties applying.—A copy of the order of court, and summons to proceed thereunder before the Remembrancer, to be served one month previously on the churchwardens and twelve of the tithe-payers in the parish, and copies thereof to be posted on the usual place of posting notices of road sessions, with liberty for the tithe-payers to appear on such reference.

The petition in this matter, which was presented under the 16th sect. of the 1 & 2 Vict. c. 109, stated that, on the 24th of May, 1823, in the parish of Knockbreda, alias Newtownbreda, in the diocese of Down, a certain composition was, in and by a certificate, in pursuance of the statutes for establishing compositions for tithes in Ireland, then and there signed in that behalf, ascertained as a composition in lieu and satisfaction of all tithes within the said parish; that the amount of said composition was thereby fixed at the sum of £584. 5s. 7½d. sterling, by the year; and that it was thereby certified that the sum of £37. 15s. 10d., portion of the said sum of £584. 5s. 7½d. was payable to the incumbent of the parish of Ballymacarrett, as a com-

position for all tithes claimable by him from that portion of the townland of Ballynaseigh, which was allocated to him by deed, under the provisions of the 11 & 12 G. 3, c. 16, and that the sum of £546. 9s. 9½d., the remaining portion of the before-mentioned sum of £584. 5s. 7½d., was then and there payable to the rector of Knockbreda, alias Newtownbreda, aforesaid, as a composition for all tithes claimable by him in said parish.

That the sum in the said certificate mentioned was afterwards apportioned upon certain lands within the said parish; and that of the sum of £546. 9s. 9½d., so certified to be payable to the rector of said parish, the sum of £22. 19s. 6d. was apportioned upon twelve several farms and parcels of land, containing, in the whole, 265A. 3R. 34P. statute measure, situate in and comprising the town and lands of Tullycarnett, as by reference to the said apportionment-book, when produced, will appear; which said several farms or parcels of land were numbered in the said apportionment-book from No. 1 to No. 12, inclusive, in the townland of Tullycarnett.

That petitioner had an interest in the said lands of Tullycarnett, and in the said several twelve farms and parcels of land comprised therein, on which said apportionment was made as aforesaid, petitioner being seized of the said lands in fee-simple, and that he was liable to the payment of rent-charge in respect of same, under the late act of the 1 & 2 Vict. c. 109, in lieu of such tithe composition.

The petition further stated, that the Rev. John Kinahan (the respondent), was rector and incumbent of the said parish, and had been such rector and incumbent at the time when the composition and apportionment were made.

That the petitioner disputed the liability of the said lands of Tullycarnett to the apportionment, by reason of such lands not being rightfully chargeable with or subject to the same, for the reasons thereafter set forth.

That the respondent was appointed, instituted, and inducted, as rector and incumbent of the said parish, on or about the 15th of January, 1824; that the Rev. Mervyn Pratt, his immediate predecessor, was appointed, instituted, and inducted in the year 1800; and that the Rev. James Featherstone, the immediate predecessor of Pratt, was appointed, &c., on or about the 12th of August, 1784.

The petition then stated, that the sum of 1½d. per acre, Cunningham measure, only, and no more, per annum, amounting in the whole to the sum of £1. 2s. 9d. sterling, of the late currency, was paid, or liable to be paid by any person out of, or for, or in respect of the said lands of Tullycarnett, and every or any part thereof, in lieu and satisfaction of all tithes payable thereout or therefor, and that such payment and *modus*, in lieu and satisfaction of all tithes as aforesaid, and no more or

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other payment was made, derived, or enjoyed respectively as aforesaid, at and immediately before the time of making such composition, and for and during the whole term that the said Mervyn Pratt and the said James Fetherstone were such incumbents respectively of said parish, and for the further period of not less than three years after the appointment, institution, and induction, of the said John Kinahan, the present incumbent; and that such period during which the said payment and *modus* were made, enjoyed, and derived respectively, in lieu and satisfaction of all tithes as aforesaid, made up the full period of sixty years next before the establishment of the said composition, over and above the period of three years after the appointment, institution, and induction of the said John Kinahan; and that no tithes had been paid, or were payable out of said lands, or any part thereof, nor any composition in lieu of tithes, save the aforesaid *modus*, during the said period of sixty years, and three years after the appointment, institution, and induction of the said John Kinahan, including the said period of the said immediately preceding incumbencies.

The petition, therefore, prayed, that the respondent might answer the premises within a reasonable time, and that the petitioner might have such relief in the premises as to the Court should seem right; and that such order as the Court should think proper might be made, allowing the aforesaid claim of exemption, or *quasi* exemption from tithes, or composition for the same, or the *modus* in lieu and satisfaction of all tithes as aforesaid, out of and concerning the said lands of Tullycarnett; or that the Court would be pleased to direct such feigned issue, or such reference to the proper officer, or such other proceeding as it should deem proper, for the purpose of ascertaining whether the said lands were rightfully charged with such tithe composition as aforesaid, and rightfully applotted as aforesaid, or would have been so rightfully charged or applotted, if the said act of the 1 & 2 Vict. c. 109, had not been passed; or whether, supposing they would have been so rightfully applotted, they were, since the passing of the said last-mentioned act, so rightfully charged, applotted, or chargeable; and that the Court might declare accordingly, and make such order, if necessary, for the amendment of the certificate and applotment aforesaid, and of the entry of said certificate and applotment in the registry of the said diocese, as to the Court should seem fit. And that the said lands of Tullycarnett might be exonerated from rent-charge in lieu of tithe or composition for tithe; or that such rent-charge upon the same might be reduced accordingly; and that the petitioner might be paid his costs incurred by this petition, and by the proceedings which might become necessary thereupon.

The matter of the petition was moved on the 8th of February last, when the Court\* made an order, whereby it was referred to the Remembrancer to inquire and report whether the lands in the petition named

\* RICHARDS, Baron, *solus*.

were, at the time of the composition in said petition specified being made, tithe-free, or not rightfully charged with, or other ways, in any, and what manner, not subject to the tithe composition in said petition specified, or to the applotment thereof, or made thereon, or had ; or whether, at the time of such composition being made as aforesaid, any and what *modus decimandi*, exemption from, or discharge of tithe, was enjoyed in respect of the said lands, or of any, and what part thereof, within the meaning of the statute or statutes of tithe composition, or for the substitution of rent-charges in lieu thereof, unless cause in ten sitting days after service of the order.

The Respondent, by his answering affidavit, admitted the several matters set forth in the petition, and stated, that a composition in lieu of tithe not having been previously effected in the parish of Knockbreda, under the provisions of the 4 *G.* 4, c. 99, the then Lord Lieutenant of Ireland, pursuant to the powers vested in him by the act of the 2 & 3 *W.* 4, c. 119, appointed Bernard Ward, Esq. sole commissioner for the said parish, to carry the acts for the establishment of tithe composition into effect therein.

After detailing the circumstances connected with the making of the composition, the respondent insisted, that whatever questions arose, or might arise, as to the respective liabilities of parties liable to the payment of proportions of said composition, he always had been, and still was entitled to be paid by the parish at large the full sum in the certificate mentioned.

The respondent, by his affidavit, also suggested that, as by the 7th section of the 1 and 2 *Vict.*, c. 109, all certificates and applotments were valid for ascertaining rent-charge, save so far as same were varied under that act, and that inasmuch as a question might arise on the act, whether the jurisdiction of the court extended to any but cases of total exemption, it was doubtful whether the court had jurisdiction to entertain the petition ; but he submitted that, even though the proportionate rate of paying the composition, or the rent-charge substituted for it by the said several townlands should be raised (which was a matter of indifference to him), in no event, should the gross amount of said composition and applotment payable out of the parish at large be reduced (save so far as the sum of £25 per cent., by which the same had already been reduced by the act enabling landlords to undertake the payment of the composition, and the recent statute substituting rent-charge in lieu of tithe composition) ; and that the said rent-charge should be calculated on the gross amount of such composition as ascertained by the certificate and applotment. And deponent submitted, that if relief were granted, it should only be on the terms of having the applotment altered, by throwing any sum which the said townland of Tullycarnett might be relieved from, on the residue of the lands in the parish.

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That, provided the whole amount of the composition were applotted on the parishioners, he had no interest in disputing the authority of the Court to make such distribution as it should think equitable, or as it had jurisdiction to make.

The respondent concluded his affidavit by submitting, that inasmuch as he had no control over the acts of the commissioner, who had acted according to the then existing state of the law, and inasmuch as the certificate and applotment were valid until altered pursuant to the late act, he should be paid by the petitioner the costs of any alteration made for his benefit, and in which he had no interest.

The affidavit of Mr. Ward, the commissioner, stated that, on the 19th of October, 1833, he signed his applotment, and thereby assessed all lands in the parish not being tithe free, equally, according to their true annual value.

That the parish of Knockbreda consisted of twenty-one townlands, nineteen of which had always, up to the making of the said composition, paid to the Rector in or near a full tenth, and the other two townlands, Tullycarnett and Gilnahirk\* had always paid the sum of 1½d. an acre only, in lieu of tithe; and that deponent was satisfied from the evidence adduced at the time of making the composition, that this *modus* or *quasi modus* had existed in the parish, if not from time immemorial, at least during the two incumbencies prior to that of the respondent, and during his incumbency, and for more than sixty years before it.

That previously to signing the certificate and applotment, he was well aware and fully satisfied of the existence of this inequality of payment in the respective townlands of the parish; and that in fixing and ascertaining the amount of the composition, he struck the average of the sums paid or agreed to be paid for the tithe of the parish, for the number of years prescribed by the tithe composition acts, charging or taking into account against all the townlands of the parish (save the said townlands of Tullycarnett and Gilnahirk), the full tithe or sum paid, or agreed to be paid as aforesaid, and against those townlands, the sum of 1½d. an acre per annum. That deponent did not include in the amount of such composition, or in the certificate, any further or other sum than the said sum of 1½d. an acre, due on account of the tithes of said two townlands; and that the gross sum included in said composition for the townland of Tullycarnett, amounted to the sum of £1. 2s. 9d., late Irish currency; and for the townland of Gilnahirk, the sum of £1. 5s. of the same currency; the sum included therein as for the remaining townlands of said parish, amounting to the sum of £582. 1s. 8d., making in all the said sum of £584. 5s. 9d., the total amount of the composition, payable out of the parish at large; which said sum had been calculated by the deponent according to the averages, and otherwise, in strict accordance with the tithe composition acts.

\* *Vide* as to the lands of Gilnahirk, *Patterson*, Petitioner, v. *Kinahan*, Respondent, *post*, 478.

That when he came to applot the said sum of £584. 5s. 9d. upon said parish, it was alleged by the persons liable to pay the tithe or sums in lieu of tithe in the said two townlands of Tullycarnett and Gilnahirk, and it was also suggested by the Patron of said parish, and by the Rev. John Kinahan, the Respondent, that inasmuch as those townlands had never paid more than at the rate of  $1\frac{1}{2}$ d. an acre, in lieu of tithe, they ought not to be applotted at any greater sum, and consequently not at the same rate as the other townlands in the parish, which had always paid in or near a full tenth. That being unwilling to act on his own judgment or responsibility in a matter of so much difficulty and importance, he consulted the then law officers of the Crown, and other counsel, as to the mode in which he should assess the said sum of £584. 5s. 9d. in said parish, and, particularly, whether the townlands of Tullycarnett and Gilnahirk were to be applotted at the rate of  $1\frac{1}{2}$ d. an acre only, or at the same rate with the other townlands of the parish.

That deponent was advised he was bound, under the 34th section of the 4 G. 4, c. 99, to assess all lands in the parish, not being tithe free, equally, according to their true annual value: that there was no exemption in the tithe composition acts for those *modus* or *quasi modus* lands; and that deponent, acting in pursuance of the 34th section of the said act, did accordingly assess the said townlands of Tullycarnett and Gilnahirk, as well as the other lands in the parish, not being tithe free, equally, according to their true annual value; and that he did not allow or give any exemption to the above lands which had so paid  $1\frac{1}{2}$ d. an acre only, in lieu of tithes.

That the effect of this was to raise the rate of payment in said two townlands from  $1\frac{1}{2}$ d. an acre to the sums of 1s. 10d., 1s. 1d., and of 8d. and 2d., according to the respective class or quality of the lands therein, and to raise the gross annual sum payable for tithe, or in lieu of tithe, out of Tullycarnett, from the sum of £1. 1s. to the sum of £22. 19s. 6d., and out of Gilnahirk, from the sum of £1. 3s. 1d. to the sum of £36. 10s.  $1\frac{1}{2}$ d., the corresponding effect of which was to diminish the rate of payment of the other nineteen townlands in the parish, and to cut down the gross sum of £584. 5s. 9d., included in the certificate of composition against them, to the sum of £524. 16s.  $1\frac{1}{2}$ d. only, charged against them, to which they became liable under the applotment. \*

On the 13th of May, Mr. Sergeant *Greene* and Mr. *Joy* applied, on behalf of the petitioner, that the conditional order of the 8th of February last, herein-before mentioned, should be made absolute, notwithstanding the affidavits filed as cause.

Mr. *T. B. C. Smith*, Q. C., and Mr. *George*, appeared for the respondent.

The COURT\* ordered that the motion should stand over, without

\* PENNEFATHER. B., *solum*.

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posted on the usual place for posting notices of road sessions, with liberty for the tithe payers to appear on such reference; such service and postings to be had and made one calendar month previous to proceeding before the Chief or Second Remembrancer under this order; the petitioner to pay the respondent the costs of answering the petition and of this motion.

—  
*Same Day.*

PATTERSON, Petitioner v. KINAHAN, Respondent.

In this case a petition, in all respects similar to that in the preceding matter, having been presented by the parties interested in the lands of *Gilnahirk*,—

The COURT made a like rule, save that the above sum of £22. 19s. 6d. was to be, in this matter, £36. 10s. 1½d.

—  
*Thursday, May 9th.*

PETITION FOR RECEIVER, UNDER 5 & 6 W. 4. c. 55—  
JUDGMENT—TRUSTEE—PRACTICE.

HANLEY, Petitioner, v. BLENNERHASSETT, Respondent.

A petition for a receiver, under the 5 & 6 W. 4, c. 55, s. 31, must be presented in the name of the party entitled to sue out an *a legit*, or issue execution upon the judgment at law.

Mr. REVELL moved to make absolute a conditional order for the appointment of a receiver, under the 5 & 6 W. 4, c. 55.

The petition stated, that the judgment in question had been vested in two persons, of the name of Swan and Hanley, the trustees in a settlement executed on the marriage of one M. Conry; that Swan was dead, and Hanley, the surviving trustee, was now stationed with his regiment in England.

The conditional order was entitled in the matter of "*Hanley*, Petitioner, v. *Blennerhassett*, Respondent," although the petition was presented and verified by M. Conry, the *cestui que trust* of the judgment in his own name.

An affidavit was made on the part of R. D'Esterre, a creditor of the respondent, insisting that the conditional order was irregular, inasmuch as the legal interest in the judgment was not vested in the person by whom the petition was presented.

Mr. *Revell*.—The rights of the *cestui que trust* are clearly recognised

by the act of parliament, as it requires the petition to be "verified by the affidavit of the person interested" in the judgment.

Mr. *Thomas Fitzgerald*, *contra*, for D'Esterre.—The objection is, that the petition is not presented in the name of the judgment creditor at law, and no person is competent to apply for a receiver under the act, who is not entitled to sue out an *elegit* or execution at law.

RICHARDS, B.\*—That objection is certainly well founded; for the petition, standing in the place of an *elegit*, must, like it, be in the name of the party appearing on record as the person in whom the judgment is vested at law. The objection does not, of course, apply to a case where the person who has the beneficial interest in the judgment, presents the petition in the name of his trustee. By the 36th section of the act, the Court has power, on payment of the debt, to direct satisfaction to be entered on the judgment, or an assignment of it to be made, as it shall think proper; but how can that be done in the absence of the trustee?

Mr. *M. Baker*, in reply.—It must be admitted that the person who represents the legal estate ought to be before the Court; but it will answer every purpose, if he be brought into such privity with the proceedings, as to give the Court jurisdiction over him. If, therefore, this motion were permitted to stand over, the trustee might be served with the order, or an undertaking procured from him, to satisfy or assign the judgment, when called on by the Court so to do.

RICHARDS, B.—I conceive I have not jurisdiction to interfere, by permitting this matter to stand over for the purpose required. The Court has jurisdiction in such cases by statute only; and therefore, to bring a case within that statutable jurisdiction, the proceeding must be such as the statute contemplates. To say that a *cestui que trust* of a judgment may carry an order of this kind, is at variance not only with the words, but also with the spirit of the act. If such a construction were given to it, the Court would be incessantly embarrassed by disputes between *cestui que trust* and trustee. The more strictly we adhere to the words of this statute, in my opinion, the better. When the person in whom the judgment is legally vested is before the Court, it can deal with the judgment as it pleases; but that person is not a party to the proceedings in the present case. I must therefore say,

No rule; and allow the cause shewn, with costs, without prejudice to any further petition or application that may be made on behalf of the person in whom the judgment is legally vested.

\* *Solus.*

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*Monday, June 3d.*

**PRACTICE—ADMISSION OF ATTORNEY.**

*In re O'BRIEN.*

Where an apprentice to an attorney upon the death of his master, entered the office of another attorney for the purpose of completing his apprenticeship, but before his indentures were assigned a term elapsed, he was, under the circumstances of the case, allowed credit for the term which had so elapsed, before the assignment of the indentures, and having served twenty clear terms inclusive of that term, was admitted an attorney of this court.

Mr. Sergeant GREENE (with whom was Mr. *Brereton*,) applied on behalf of Octavius O'Brien, that he might be admitted an attorney, under the following circumstances.

The petitioner entered the office of a Mr. Greene, an attorney, for the purpose of being bound an apprentice, in June, 1834, and in July swore the preparatory affidavit, before one of the Judges of Assize, but his indentures were not executed, nor the stamp duty paid, until the 21st of November following. He continued in the office of Greene until the death of the latter, which took place on the 20th of November, 1837. On the 7th of January following, he entered the office of Mr. Westropp, an attorney, for the purpose of completing with him the residue of the term of his apprenticeship, and accordingly, in Hilary Term, presented a petition to the Society of Queen's Inns, for liberty to assign his indentures, but in consequence of Mr. Westropp having three apprentices on the day the Benchers sat, his petition was refused, although in two days after, one of the apprenticeships expired. As the Benchers sat but one day in that term for investigating petitions of this description, there was no opportunity of presenting a second petition until the following term. A petition having been accordingly presented in the next term, and liberty to assign the indentures obtained, they were duly assigned on the 1st of May, 1838.

Sergeant *Greene*.—If the Court will allow the petitioner credit for Hilary Term, 1838, which he so lost in consequence of the rejection of his petition, he will, at the expiration of the present term, have served twenty clear terms, which according to the practice of this Court, is sufficient (a). Notice of the application has been given to the Law Society.

The COURT\* said the practice was as stated, viz, to calculate the period of the apprenticeship, not by the day of the year but by the number of Terms served; and that as they conceived this to be a case falling within the principle of the rule, they would, under the circumstances, grant the application.

(a) Vide *In re Powell*, ante p. 323.

FOSTER Baron, and RICHARDS Baron.

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- 1 Statement in a bill if relevant and material to the suit, not to be deemed scandalous. *Everard v. —*, Sir M. O'L. 421
- 2 Limitation of the time within which a pleading should be referred for prolixity and impertinence, under New Rule (Nov. 1834) does not extend to scandal; as to which the court will extend the time as much as possible. *Everard v. —*, Sir M. O'L. 421

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- 1 Application to take answer off file to be used as evidence on prosecution for perjury, refused. *Daly v Toole*, Lord Plunket 344
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- 3 Receiver making out rental—Obstruction by tenants—Practice. *Peyton v M'Dermott*, Sir M. O'L. 326
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- 7 Receiver must give security, though all parties consent to waive it. *Bailie v Bailie*, Sir M. O'L. 413
- 8 Receiver—Equity jurisdiction to appoint receiver—Annuity cause—Answer admitting deed, but alleging fraud and usury—Court appointed a receiver until the hearing, deed being unobjectionable *prima facie*. *Kelly v Butler*, Sir M. O'L. 435

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- 1 Practice as to rents accruing before sale confirmed. *Scott v Rothe*, Sir M. O'L. 105
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- 1 Production of deeds under decree for sale—Master to certify what deeds to be lodged and which to be produced for inspection—182d Order of Nov. 1834. *Chaytor v Chaytor*, Sir M. O'L. 432
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- 3 Sale under decree—Exceptions to report of good title—1 W. 4, c. 47, s. 12—Effect of decree on persons not parties—Default by executor of executor. *Oldham v Wilkins*, Sir M. O'L. 59
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- 1 Sheriff and sub-sheriff—Illegality of contract within 12 G. 1, c. 4—Account. *Drummond v Ponder*, Lord Plunket 223
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- 1 Admission to practise—Five years' apprenticeship within 7 G. 2, c. 5—Devotion of whole time of apprentice to master—Holding public situation incompatible with apprenticeship—Discretion of court under 13 & 14 G. 3, c. 23. *In re Lyons*, Eq. Ex. 267
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- Where an apprentice to an attorney, upon the death of his former master, entered the office of another attorney for the purpose of completing his apprenticeship, but before his indentures were assigned a term elapsed, he was under the circumstances of the case allowed credit for the term which had so elapsed; and having served twenty clear terms inclusive of that term, he was admitted an attorney of the Court of Exchequer. *In re O'Brien*, Eq. Ex. 480

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- 10 A petition for a receiver must be presented in the name of trustee, as well as the parties entitled to issue execution on a judgment. *Hanley v Blennerhasset*, Eq. Ex. 479

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